Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

LUIS CARLOS QUINTERO-CRUZ,

Petitioner,

vs.

KELLY WARD, WARDEN OF DAVID WADE CORRECTIONAL CENTER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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104 pp

QUESTIONS PRESENTED FOR REVIEW

1. Does 28 United States Code Section 2253(c), as enacted by the Antiterrorism And Effective Death Penalty Act of 1996, require a district court judge, circuit court judge, or circuit justice of this Court to issue a certificate of appealability to permit an appeal to the circuit court, whenever the issues to be raised on appeal are not frivolous and could convince as few as one appellate court judge that the appeal has merit?

2. May a judge consider appealability of issues of interpretation of the federal habeas corpus statutes, evidentiary issues and procedural questions, none of which themselves are constitutional rights but which arise during the course of the habeas corpus litigation, when determining whether a certificate of appealability should issue pursuant to 28 United States Code Section 2253(c), as enacted by the Antiterrorism And Effective Death Penalty Act of 1996?

3. Does the requirement that an appellant make a "substantial showing of the denial of a constitutional right" in order to obtain a certificate of appealability pursuant to 28 United States Code Section 2253(c), as enacted by the Antiterrorism And Effective Death Penalty Act of 1996, pertain to the nature of the issue or issues to be raised on appeal or does that showing merely relate to the nature of the claim raised in the petition as the basis for issuance of the writ?

QUESTIONS PRESENTED FOR REVIEW – Continued

4. Whether 28 United States Code Section 2253(c), as amended by the Antiterrorism And Effective Death Penalty Act of 1996, is so vague and standardless as to violate the Due Process Clause of the Fifth Amendment to the Constitution of The United States?

LIST OF PARTIES

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Doug Moreau, District Attorney, 19th Judicial District, East Baton Rouge Parrish, State of Louisiana.

Luis Carlos Quintero-Cruz, prisoner in the custody of the State of Louisiana.

Richard Stadler, Secretary, Department of Corrections, State of Louisiana.

Kelly Ward, Warden of David Wade Correctional Center in the State of Louisiana.

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Luis Carlos Quintero-Cruz, petitions this Court to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals, which denied a certificate of appealability, is unpublished. That opinion is reproduced in the appendix to this petition. (App. 70-71).

BASIS FOR JURISDICTION

The opinion of the lower appellate court was filed on May 27, 1997. That lower appellate court issued its mandate on the judgment on the very same day that it rendered its decision.

This Court has jurisdiction to review this decision of the lower circuit court to deny a certificate of appealability either under its jurisdiction to review a case in the United States Court of Appeals pursuant to 28 United States Code Section 1254, *see Lozada v. Deeds*, 498 U.S. 430 (1991), *Maxwell v. Bishop*, 385 U.S. 650 (1967), *Phelper v. Decker*, 385 U.S. 18 (1996), or pursuant to the All Writs Act, 28 United States Code Section 1651, *see Davis v. Jacobs*, 454 U.S. 911 (1981)(opinion of Stevens, J. and dissenting opinion of Rehnquist, now C.J.); *House v. Mayo*, 324 U.S. 42 (1945).

The issues presented for review in this petition involve construction of the very jurisdictional statute that determines whether a case is "in the court of appeals" for the purpose of determining under which of the above jurisdictional statutes this Court has jurisdiction. A court always has jurisdiction to determine whether it has jurisdiction. *In re Nat'l Labor Relations Bd.*, 304 U.S. 486 at 494 (1938). Under the procedural context in which the issues presented for review arise, this petition involves a case "in the court of appeals."

Petitioner advises this Court that petitioner is simultaneously filing an application for a certificate of appealability with the Circuit Justice for the Fifth Circuit, pursuant to 28 United States Code Section 2253(c)(1). The issues raised by this petition would not be mooted by the granting of that application. Indeed, the issues raised by this petition should be determinative of whether the Circuit Justice should or can issue that certificate in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides:

> No person shall . . . be deprived of life, liberty, or property, without due process of law;. . . .

Title 28 United States Code Section 2253(c) provides:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

A the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

B the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

STATEMENT OF THE CASE

Petitioner Quintero-Cruz was convicted of the crime of first-degree murder, after a jury trial. Petitioner was sentenced to life imprisonment. This defendant took a direct appeal to the Court of Appeal of Louisiana, Third Circuit. That appellate court affirmed the judgment. *State v. Velez*, 588 So.2d 116 (La. 3d Cir. 1991). The Supreme Court of Louisiana denied further review. *State v. Velez*, 592 So.2d 408 (La. 1992). The direct appellate process terminated with the denial of a petition for a writ of certiorari by this Court in an order dated June 29, 1992. *Quintero-Cruz v. Louisiana*, 508 U.S. 1220 (1992). The primary issue raised in all of those courts by petitioner was a constitutional claim of racial discrimination by the prosecution in the exercise of peremptory challenges against prospective petit jurors as predicated on *Batson v. Kentucky*, 476 U.S. 79 (1986) and its progeny.

On November 29, 1993, petitioner Quintero-Cruz filed a petition for a writ of habeas corpus, pursuant to 28 United States Code Section 2254, in the United States District Court for the Western District of Louisiana. The primary issue raised in that petition was a *Batson* claim.[1]

As stated in that habeas corpus petition, the following pertinent facts were presented to the federal district court: (App. 1-13).

On the first day of jury selection, the prosecutor exercised a peremptory challenge against a black juror. The defendants objected to this challenge. Commendably, the trial judge was sensitive to this matter, but evidenced concern that a *Batson*-Article 795(B)[2] claim could not be raised by a defendant, who was not himself an African-American. Petitioner is Hispanic. Ultimately on his own, the trial judge requested full argument on this issue, if the defense wanted to pursue it, and expressly stated that he wanted to be sure that this issue was preserved.

On the ninth day of jury selection, the defense began making its *Batson*-Article-795(B) arguments in earnest. The defense maintained that it had standing to raise this claim, especially under the statute. The State responded

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[1] Petitioner also raised a constitutional claim regarding the denial of a requested jury instruction. For the purpose of simplifying the issues raised in this petition, it is not necessary to discuss that claim here.

[2] Subsequent to the decision *Batson v. Kentucky*, 476 U.S. 79 (1986), the legislature of the State of Louisiana enacted a law to make a statute out of the *Batson* decision. That statute became Louisiana Code Of Criminal Procedure Article 795(B).

that it had not used a peremptory challenge against anyone of Colombian nationality and that the defendant and his co-defendants lacked standing to challenge the State's exclusion of black jurors. The trial judge ruled that he was overruling the defense objection on the basis of the State's argument.

When the defense attempted to make a contemporaneous objection to another exclusion of a black, the trial judge told defense counsel that any *Batson*-type challenge was to be made in the form of a motion for a mistrial after the jury was sworn.

The State used all of its thirty-six challenges before the last juror was selected. By the prosecutor's own calculations, fifteen of these peremptory challenges were exercised against black jurors.

At a final argument on this claim, the State again responded that the defense had not met the element of *Batson* that the defendants were of the same race as the excluded black jurors. The trial judge ruled in accordance with the State's position on the *Batson* claim and also held that this ruling applied to the statutory prohibition.

After repeated defense objections, one black juror, Ms. Shaw, was selected as the eleventh juror.

During the entire jury selection process, the State never offered to provide even one neutral explanation for peremptorily challenging the black prospective jurors.

Under Louisiana's criminal procedure, a prospective petit juror is immediately sworn as a petit juror, if neither the State nor the defense exercises a peremptory challenge against him or her. La. Code Crim. Proc. Art. 788;

State v. Martin, 329 So.2d 688, 690 (La. 1976). Restated, Louisiana follows a use-it-or-forever-lose-it procedure for peremptory challenges.[3]

Because of this fact, Louisiana procedure can easily expose a pattern in a prosecutor's strikes.

On direct appeal, petitioner took the simple position that the precise issue of whether petitioner could raise a *Batson* claim was then pending before this Court in a case styled *Powers v. Ohio* and that resolution of that case would be decisive.

In a reply brief, petitioner honed in on the showing in the record that a prima facie case of discrimination was made before the trial court, assuming that petitioner had standing. Petitioner Quintero-Cruz specifically referred to the transcript of the voir dire of two black prospective jurors, Mrs. Charles and Mr. Cormier, both of whom the State peremptorily challenged.[4]

The questioning of those two jurors was very brief. Those two jurors were asked the same basic questions by the State that were asked of all of the jurors that were selected to serve on the jury. There is not one neutral reason apparent from the trial court record to explain

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[3] Other jurisdictions permit the procedure of backstriking of prospective jurors, before the jury is sworn in as a single unit.

[4] The excerpt of the voir dire of Ms. Charles and Mr. Cormier was included in the appendix to the petition for a writ of certiorari that was filed by petitioner in his prior petition to this Court in United States Supreme Court case number 91-1746. The identical excerpt was also filed as an exhibit to the petition for a writ of habeas corpus, which was filed in the lower federal district court.

why the State peremptorily challenged prospective jurors Cormier and Charles. Not one answer showed a bias against either the State or the defense. Moreover, these two prospective African-American jurors gave answers to voir dire questions, which cannot be distinguished from any of the answers received from any of the twelve jurors, who were selected to serve on the jury.

Indeed, the defense exposed what the prosecution was doing by waiving any defense questioning of black prospective juror Charles, following which the State peremptorily challenged Mrs. Charles. Of similar import is the fact that the State announced a peremptory challenge of prospective juror Cormier almost immediately after the first defense attorney began his voir dire questioning of Mr. Cormier.

Petitioner maintained that the transcript of the exclusion of prospective jurors Cormier and Charles, itself, was enough to raise the needed inference that at least these two African-Americans were excluded from jury service because of discrimination against blacks.

Prior to a decision in this case by the intermediate Louisiana appellate court, this Court decided *Powers v. Ohio*, 499 U.S. 400 (1991). *Powers* vindicated the precise position, which petitioner Quintero-Cruz had asserted before the trial court.

In its written opinion, the intermediate Louisiana appellate court found that the trial judge rejected petitioner's *Batson* challenge, because petitioner Quintero-Cruz was not of the same race as the peremptorily-challenged black jurors. *State v. Velez*, 588 So.2d at 124, 126. That court also recognized the binding nature of the

Powers decision on this direct criminal appeal and held that the trial judge erred in his ruling on standing. *State v. Velez*, 588 So.2d at 124-126, 127. Nevertheless, that Louisiana appellate court refused to reverse. Instead, that appellate court decided to review the cold record in the first instance and made the initial determination that nothing in the transcripts of the jury voir dire established a prima facie case of discriminatory intent in the selection of the jury. *State v. Velez*, 588 So.2d at 126.

Simply stated, the state appellate court made the determination that the appellate record conclusively established the absence of a prima facie case of racial discrimination by the prosecution in the selection of the jury that tried this case. The reasoning of that appellate court is a jumble of numbers and statements, which are entirely lacking in a basic legal theoretical approach to how to determine whether a prima facie case of discrimination is established.

The basis for the Louisiana appellate court's conclusion that the record on appeal did not demonstrate a prima facie case of racial discrimination is found in two sentences. That court found that "the record reflects no pattern of strikes against blacks and no systematic exclusion of blacks from this jury." That court summarized its omnibus evaluation, "What we detect from the voir dire transcript is the prosecutor's preoccupation with seating jurors open to, and comfortable with, the death penalty, a characteristic she would have understandably desired for all jury members." *State v. Velez*, 588 So.2d at 126. Finally, that state appellate court concluded that "the State did not exercise its peremptory challenges with a discriminatory purpose. Neither the voir dire transcript nor the

numerical evidence concerning the prosecutor's challenges support such an inference;. . . . " *State v. Velez*, 588 So.2d at 127.

The petitioner sought review of this intermediate appellate court decision in the Supreme Court of Louisiana. In the pleading, which was filed in that court, the petitioner asserted that the lower appellate court's ultimate conclusion was debunked simply by review of the transcript of the voir dire of Mrs. Charles and Mr. Cormier. Contrary to the implication in the lower state appellate court's opinion, these transcripts unequivocally established that both venirepersons Charles and Cormier were open to, and comfortable with, the death penalty. Indeed, both of these African-Americans expressly stated that they could impose the death penalty not only upon the alleged trigger man, but also the alleged aider and abettor, who was present at the scene of the homicide, and even the alleged non-present co-conspirator. Nothing stated by the lower appellate court neutralized the total absence of a rational explanation for the State's exercise of its peremptory challenge of those two jurors.

Following the above factual recitation, petitioner Quintero-Cruz argued in his federal habeas corpus petition that the cold appellate record did not fairly support the state intermediate appellate court's findings regarding the *Batson* claim. The petitioner argued to the federal court that the striking of ten blacks in a row constituted an indisputable pattern of strikes. Moreover, petitioner pointed out that the prosecution had never given a race neutral reason for the exercise of any of the disputed peremptory challenges.

On July 12, 1995, a federal magistrate judge held an evidentiary hearing, which was limited to the issue of whether the prosecution had a race neutral reason for the exercise of its peremptory challenges against the prospective black jurors and, in particular, the exercise of its challenges to jurors Charles and Cormier. That judge asserted that the petitioner had a burden of proving by clear and convincing evidence entitlement to federal habeas corpus relief. (App. 14-15, 17-18). During testimony, the prosecutor testified that she challenged Mr. Cormier, primarily because he appeared to be a homosexual. (App. 19-20).

In a supplemental memorandum of law filed after this evidentiary hearing, petitioner Quintero-Cruz argued that several of the intermediate state appellate court's findings were not entitled to a presumption of correctness pursuant to the then-existing provisions of 28 United States Code Section 2254(d). Petitioner argued that the burden of proof announced by the magistrate during the hearing was erroneous and that a habeas defendant had a burden of establishing his claim by only a preponderance of the evidence. (App. 21-30).

On April 26, 1996, the President of the United States signed into law the Antiterrorism and Effective Death Penalty Act of 1996. That legislation made significant changes in federal habeas corpus litigation by state prisoners pursuant to 28 United States Code 2254 and in post-conviction litigation by federal prisoners pursuant to 28 United States Code Section 2255. Pub. L. 104-132, 110 Stat. 1214.

On July 19, 1996, the federal magistrate judge filed a written report and recommendation. (App. 31-51).

Among other things, the magistrate judge made the following rulings: The Louisiana intermediate appellate court's finding that there was no prima facie showing of a *Batson* violation was a finding of fact that was entitled to a presumption of correctness under 28 United States Code Section 2254(d). (App. 39-47). The striking of ten blacks in a row did not establish a discriminatory pattern of strikes, as that concept was used in the *Batson* line of cases regarding an inference of discriminatory motive. Alternatively, the magistrate judge found that petitioner Quintero-Cruz did not meet his burden of establishing that the prosecutor's explanations at the federal court evidentiary hearing established a *Batson* violation. That judge found, among other things, that the prosecutor's striking of prospective juror Cormier, on the basis that he was a homosexual was a valid reason for the exercise of that peremptory strike. (App. 50).

On August 2, 1996, petitioner filed objections to this report and recommendation. Petitioner Quintero-Cruz asserted entitlement to another evidentiary hearing, because the magistrate judge employed the wrong legal burden of proof, when evaluating the evidence elicited during the evidentiary hearing. Petitioner also argued error in the magistrate's rulings on the issue of presumption of correctness and its conclusion that there was no pattern of strikes sufficient to establish a prima facie case. Finally, petitioner asserted that the explanation for the striking of Mr. Cormier on the ground that he was a homosexual was itself an unconstitutional reason for exercising that peremptory strike. (App. 55-59).

On August 14, 1996, the clerk entered on the docket[5] the district court judge's tersely worded judgment, which adopted the magistrate judge's report and recommendation and which denied the petition for a writ of habeas corpus with prejudice. The petitioner's objections to that report were not discussed. (App. 60-61).

On September 12, 1996, petitioner filed his notice of appeal from that final judgment. The next day, petitioner filed a request for the district court judge to issue a certificate of appealability pursuant to the recently amended Federal Rule of Appellate Procedure 22. Petitioner argued that the legal standard for issuance of this certificate was merely a showing that petitioner had appellate issues that were debatable among jurists and that all of the issues contained in petitioner's supplemental memorandum of law and petitioner's objections to the magistrate's report and recommendation met that standard. Petitioner argued that there was no frivolous issue, as was established by the fact that the magistrate judge held an evidentiary hearing. (App. 62-63).

On January 2, 1997, the federal district court judge denied a certificate of appealability. In pertinent part, the trial judge wrote as his reasons for denial: "The petitioner's appeal is without merit. Petitioner has failed to establish a prima facie *Batson* violation and the record fails to support any finding of purposeful racial discrimination." (App. 64-65).

On January 17, 1997, petitioner Quintero-Cruz filed a request for a certificate of appealability in the United

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[5] That judgment was filed with the district court on August 12, 1996.

States Court of Appeals for the Fifth Circuit. Simply stated: petitioner argued the following: (1) The same legal standards for issuance of the former certificate of probable cause applied to this request. (2) A substantial showing of denial of a federal constitutional right must be made. (3) Petitioner did not have to show that he would prevail on the merits of his appeal. (4) The holding of an evidentiary hearing on the underlying constitutional *Batsôn* claim and the four issues contained in the petitioner's objections to the magistrate's report and recommendation met the requirements for issuance of a certificate of appealability and established that this appeal was not frivolous. (App. 66-69).

On May 27, 1997, a single judge of the Fifth Circuit filed an order denying the requested certificate. This written order stated that a certificate of appealability "may be issued only if the applicant makes a substantial showing of the denial of a constitutional right" and that "Quintero-Cruz has not met this standard." (App. 70-71).

On the same day as that order was filed, the Fifth Circuit issued its mandate and returned the record on appeal to the trial court. (App. 72). This mandate was issued before petitioner even received notice of the denial of his certificate of appealability and before petitioner could file a petition for a rehearing. That action was in violation of Federal Rules of Appellate Procedure 40 and 41. Under the Fifth Circuit's local Rule 41.2, the mandate could not be recalled once issued, except to prevent injustice. As a consequence, the petitioner was deprived of his ability to seek rehearing.

REASONS FOR GRANTING THE PETITION

The enactment of section 102 of the Antiterrorism and Effective Death Penalty Act of 1996 appears to have made a major change in the appealability of *every* criminal collateral postconviction proceeding in the federal courts. Pub. L. 104-132 § 102, 110 Stat. 1214 at 1217-1218. The construction of the newly created 28 United States Code Section 2253(c) and the issue of its validity will have a major effect upon the administration of criminal justice in the federal system.

A. The Status Of The Law Prior To Enactment Of The New Statute.

In the year 1908, Congress enacted legislation that precluded a state prisoner from appealing a final federal district court decision in a habeas corpus proceeding unless some judge or justice of the Supreme Court was of the opinion and certified "that there exists probable cause for an appeal." Act of Mar. 10, 1908, ch. 76, 35 Stat. 40. The purpose of that legislation was to terminate frivolous appeals. *Davis v. Jacobs*, 454 U.S. 911 at 917 (1981) (dissenting opinion of Rehnquist, now C.J).

In the year 1948, that original statutory concept was written into 28 United States Code Section 2253. That statute provided that a state prisoner in a habeas corpus proceeding could not appeal a final order in his federal habeas corpus proceeding unless a judge or circuit justice of this Court "issues a certificate of probable cause." That requirement was regarded as a jurisdictional precondition to the taking of an appeal. *See McCarthy v. Harper*, 449 U.S. 1309 (1981) (opinion of Rehnquist, J as Circuit Justice).

Although in federal jurisprudence the phrase "probable cause" is as old as the Fourth Amendment to the Constitution, that term of art was never defined by Congress as part of this statute or as part of any of its predecessor versions. Indeed, this lack of definition perplexed federal judges, who tried to give some operable definition to this phrase in the context of this statute. Those definitions included "not plainly frivolous," "a substantial question," "not frivolous and presenting some question deserving of review," and "a substantial showing of the denial of a federal right." Some judge suggested that entitlement to a certificate of probable cause was entirely discretionary.[6] *See e.g. Gordon v. Willis*, 516 F. Supp. 911 (N.D. Ga. 1980); *Dillingham v. Wainwright*, 422 F. Supp. 259 (S.D. Fla. 1976); Hunter, Post Conviction Remedies, 50 F.R.D. 153 at 176 (1971); Blackmun[7], Allowance of in Forma Pauperis Appeals in § 2255 and Habeas Corpus Cases, 43 F.R.D. 343 at 352 (1967).

In the year 1983, this Court interpreted that statute, again reaffirming that the purpose of that statute was to eliminate frivolous appeals. This Court adopted the above definitions, opining that there must be "a substantial showing of the denial of a federal right." *Barefoot v. Estelle*, 463 U.S. 880 at 892-893 (1983). In a footnote, this

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[6] The statute, itself, lacks words of discretion regarding whether a certificate should issue. Regarding the denial of a certificate of probable cause under a predecessor to 28 United States Code Section 2253, this Court considered whether the "circuit court of appeals abused its discretion in refusing to allow the appeal." *House v. Mayo*, 324 U.S. 42 at 44 (1945).

[7] The Honorable Harry Blackmun, the author of this article, subsequently became a justice of this Court.

Court stated that the standard was "a question of some substance" or a "substantial showing," but one that did not require that the prisoner show that he would prevail on the merits. *Id.* 463 U.S. at 893 n. 4.

The discussion of a certificate of probable cause in *Barefoot* must be considered in the context of federal habeas corpus litigation as it then existed. The phrase "denial of a federal right" must be understood to mean no more than the obvious fact that if a state prisoner did not allege a deprivation of a federal right, the federal habeas corpus statute for state prisoners, 28 U.S.C. § 2254, was simply inapplicable.[8] *Engle v. Isaac*, 456 U.S. 107 at 120 n. 19 (1982). Consequently, it is clear that the significant verbiage in *Barefoot* is the phrase "substantial showing" – not the phrase "denial of a federal right."

When *Barefoot* was decided, Congress had never limited the type of issues that could be raised on appeal from a final judgment issued in a federal habeas corpus proceeding to review a state court criminal judgment. Consequently, prior to *Barefoot*, significant federal appellate issues arising in habeas corpus litigation for state prisoners concerned more than the substance of the underlying claim. Appellate issues included those involving application of various provisions of the habeas corpus statute applicable to state prisoners. *E.g. Anderson v. Harless*, 459 U.S. 4 (1982) (exhaustion of available state court remedies); *Marshall v. Longberger*, 459 U.S. 422 (1983) (presumption of correctness to be given state court factual

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[8] The statute, itself, permits relief if a state prisoner establishes that he is in custody "in violation of the Constitution *or* laws *or* treaties of the United States." 28 U.S.C. § 2254(a).

findings); *Harris v. Nelson*, 394 U.S. 286 (1969) (matters of procedure).

B. The New Version Of This Statute Creates Several Issues of National Importance

The legislative history of Section 102 of the Antiterrorism And Effective Death Penalty Act of 1996, which contains the present version of 28 United States Code Section 2253(c), does little to aid in construction of 28 United States Code Section 2253(c). This section was just one part of a major congressional reform of federal habeas corpus law following the Oklahoma City bombing in April of 1995. It is clear from the remarks of Senator Hatch and Congresswoman Pryce, both of whom presented the bill to their respective houses of Congress, that the overall purpose of this reform was to prevent criminals from avoiding just punishment "by filing frivolous appeals for years on end" and to "free the judicial process from endless and frivolous appeals from prisoners." 142 Cong. Rec. S3475-3476 (daily ed. April 17, 1996); 142 Cong. Rec. H3599 (daily ed. April 18, 1996).

The present version of 28 United States Code 2253(c) makes major changes in the law of habeas corpus appeals. First, the reach of this new statute has been expanded to include appeals by federal prisoners, who are litigating post conviction pursuant to 28 United States Code Section 2255. Under the predecessor version of this statute, those prisoners did not have to obtain a certificate of probable cause in order to take an appeal from an adverse judgment. *Lynch v. Blodgett*, 999 F.2d 401 at 403 n. 2 (9th Cir. 1993).

The critical language in this statute is that contained in subsections (c)(2) and (c)(3) of Section 2253. Those subsections provide: "A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." That language is clarified by the next sentence, which states that "the certificate of appealability . . . shall indicate which specific issue or issues satisfy the showing required by paragraph (2)." Congress does not provide a statutory definition for any of the words used here. What does this jurisdictional statute mean?

It is not clear if the use of the word "may" grants some federal judge or some circuit justice discretion to decline issuance of a certificate, even if the prisoner meets every other requirement.

What is the meaning of the phrase "substantial showing?" Congress did not define this phrase. Did Congress intend to adopt the concept espoused in *Barefoot v. Estelle*, 463 U.S. 880 at 892-893 (1983)? It is true that Congress is presumed to have intended that a word having a judicially settled meaning have the same meaning when used in one of its statutes. *United States v. Merriam*, 263 U.S. 179 at 187 (1923). However, as has been shown, this phrase did not have a clearly settled meaning at the time that *Barefoot* was decided. *Barefoot's* definition was somewhat nebulous.

Does this phrase mean what Justice Douglas attributed to the phrase "substantial question" in *Herzog v. United States*, 75 S.Ct. 349 (1955) (opinion of Douglas, J as Circuit Justice), which states that the fact that one judge would be likely to see merit in the contention is sufficient

to establish substantiality and that doubts should be resolved in favor of the prisoner?

Even if one assumes that the phrase "substantial showing" has a clear meaning, when during the litigation does one measure the claim? When Congress immediately thereafter talks about the "specific issue or issues" that satisfy this phrase, is Congress talking about a substantial showing of the denial of a constitutional right on the face of the petition in terms of an "*issue* being raised in the petition" or is Congress concerned with the showing at the time of the entry of the judgment in district court and, therefore, talking about the "appellate *issue*" to be raised? Is that showing to be made without regard to the existence of arguable significant errors occuring during the federal court habeas litigation in the admission of evidence, the burden of proof, application of presumptions of correctness or other errors of procedure?

The use of the phrase "denial of a constitutional right" is enigmatic! Congress did not simultaneously amend 28 United States Code Section 2254(a). That statute contains the substantive issues raisable in federal habeas corpus proceedings initiated by state prisoners. That statute permits relief for a "violation of the Constitution *or* laws *or* treaties of the United States." How can Section 2253(c) and Section 2254(a) be reconciled?[9] Did

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[9] As noted, this new statute now also applies to litigation pursuant to 28 United States Code Section 2255. The first paragraph of that latter statute permits a broader base of relief to federal prisoners. Section 2255 covers "violations of the Constitution *or* laws of the United States, *or* that the court was without jurisdiction to impose such sentence, *or* that the sentence was in excess of the maximum authorized by law, *or* is

Congress intend to limit appeals only to issues on the merits of the constitutional right denied, eliminating the ability to appeal legal rulings on exhaustion of available state court remedies, presumptions of correctness and other nonconstitutional issues that could be outcome determinative? One lower court has imposed such a limitation on that statute. *Lozada v. United States*, 107 F.3d 1011 at 1013 (2d Cir. 1997); *see United States v. Eyer*, 113 F.3d 479 at 474 (3d Cir. 1997). That construction leads to an absurd result, whether it applies to state prisoners under Section 2254 of federal prisoners under Section 2255.[10]

How does a prisoner make a substantial showing of the denial of a federal constitutional right, if the district court judge denies the petition without considering the underlying merits of the claim? How does a prisoner make a substantial showing of the denial of a federal constitutional right, if the district court judge denies the petition after an evidentiary hearing?

Assume that the determination of whether a substantial showing of the denial of a constitutional right is to be made after an evidentiary hearing. How does a judge determine if a substantial showing of a constitutional right is made, if the prisoner presents a nonconstitutional issue for appeal that, if reversed on appeal, would alter

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otherwise subject to collateral attack." Have all but "violations of the Constitution" become nonappealable issues in Section 2255 litigation?

[10] That construction would prevent federal prisoners from receiving appellate review of e.g. a postconviction claim that a sentence was beyond the statutory maximum. *See* footnote 9.

the ultimate issue of whether a substantial showing was made?

The answer to these questions of statutory construction determines whether petitioner Quintero-Cruz is entitled to a certificate of appealability.

In this case, it is clear that petitioner Quintero-Cruz made a substantial showing of the denial of a federal constitutional right in his petition, as petitioner argued in his requests for a certificate of appealability. Indeed, the federal magistrate held an evidentiary hearing. Did the lower court judges improperly consider the substantiality of the showing of the denial of a constitutional right by looking to the record as it existed after the evidentiary hearing?

Petitioner's appellate issue regarding the magistrate's application of the presumption of correctness to the state appellate court's findings is not a frivolous issue and certainly could convince one appellate court judge. Likewise, the issue of whether the magistrate judge used the wrong burden of proof is both nonfrivolous and potential reversal in the eyes of at least one appellate court judge. Assuming that to be the case, did the lower federal judges believe that they could deny a certificate of appealability as a matter of discretion?

The issues pertaining to presumption of correctness and burden of proof are not issues of "denial of a constitutional right." Petitioner Quintero-Cruz argued that those issues were relevant to his entitlement to a certificate of appealability. Did the lower courts in this case err in refusing to consider those issues, when determining whether to issue a certificate of appealability?

Given the vagueness of this statute and the absence of any statutorily defined standards to answer the various questions posed in this petition, the real issue presented here is whether this statute denies due process, because it permits judges to guess at how this statute should be applied and, therefore, permits arbitrary determinations as to whether any prisoner may take an appeal.[11] *See Kolender v. Lawson*, 461 U.S. 352 at 357-358 (1983); *Giaccio v. Pennsylvania*, 382 U.S. 399 at 402-403 (1966).

The questions presented for review in this petition warrant definitive resolution by this Court at this time. If Congress must act to clarify this statute, it should be permitted to take corrective action soon. If state and federal prisoners are entitled to protection of their federal statutory right to appeal, they are entitled to be protected now. There is no doubt that this hastily enacted legislation has already created problems of statutory interpretation in other areas – albeit on issues of less importance to the prisoners and issues easier to resolve than those presented by this petition. *See United States v. Asrar*, 116 F.3d 1268 (9th Cir. 1997).

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[11] No appellate decision ever ruled on the constitutionality of the predecessor statutes to the present 28 United States Code Section 2253(c).

CONCLUSION

For the above-stated reasons, this petition for a writ of certiorari should be granted. The United States Court of Appeals for the Fifth Circuit should be ordered to issue a certificate of appealability to the petitioner.

Respectfully submitted,

ARTHUR JOEL BERGER
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APPENDIX

Petition For Writ Of Habeas Corpus .....App. 1

Order Setting Evidentiary Hearing .....App. 14

Excerpts From Transcript of Evidentiary Hearing.....App. 17

Petitioner's Supplemental Memorandum Of Law.....App. 21

Report And Recommendation Of Magistrate Judge .....App. 31

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA

CASE NUMBER:

LUIS CARLOS QUINTERO-CRUZ, *Petitioner,* vs. KELLY WARD, Warden of David Wade Correctional Center; RICHARD STADLER, Secretary, Department of Corrections, State of Louisiana; RICHARD P. IEYOUB, Attorney General, State of Louisiana; and DOUG MOREAU, District Attorney, 19th Judicial District, East Baton Rouge Parish, *Respondents.*	**PETITION FOR A WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2254 AND INCORPORATED MEMORANDUM OF LAW**

The Petitioner, LUIS CARLOS QUINTERO-CRUZ, by and through undersigned counsel files this his Petition For A Writ Of Habeas Corpus And Incorporated Memorandum Of Law and in support thereof states:

Jurisdiction And Venue

The Petitioner, LUIS CARLOS QUINTERO-CRUZ, is presently imprisoned at Wade Correctional Center, a prison of the State of Louisiana. That prison is located in Homer, Louisiana. Petitioner is incarcerated pursuant to a final criminal judgment, which was entered in the Fourteenth Judicial District Court in Calcasieu Parish, State of

Louisiana. Petitioner's trial was held in Lake Charles, Louisiana.

This Court has jurisdiction of this petition pursuant to 28 United States Code Section 2254. Venue is proper in this Court, because both the location of the trial and the place of incarceration are within this district. *Story v. Collins*, 920 F.2d 1247 (5th Cir. 1991); 28 U.S.C. § 2241(d).

Procedural History

Petitioner-defendant QUINTERO-CRUZ entered a not-guilty plea and was tried by a jury, which returned a verdict of guilty of the crime of first-degree murder against him. Petitioner was tried jointly with two other persons. Petitioner did not testify at his trial. Petitioner was sentenced on this single count of first-degree murder to life imprisonment on May 21, 1987.

The defendant took a direct appeal to the Court of Appeal of Louisiana, Third Circuit. That appellate court rendered a decision on October 2, 1991 in which that court affirmed the judgment. That written opinion is reported as *State v. Velez*, 588 So.2d 116 (La. 3d Cir. 1991). All of the issues, which were raised on direct appeal, were discussed in the body of that opinion. As will be explained below, all of the issues raised in this petition were also raised on direct appeal.

Petitioner sought further review by a writ of certiorari in the Supreme Court of Louisiana. That court denied review in an order dated January 31, 1992. That order is reported as *State v. Velez*, 592 So.2d 408 (La. 1992).

Finally, the defendant petitioned for a writ of certiorari in the Supreme Court of the United States. That Court denied review in an order dated June 29, 1992. That order is reported as *Quintero-Cruz v. Louisiana*, ___ U.S. ___, 112 S.Ct. 3031 (1992).

Petitioner has not sought any post-conviction relief by the vehicle of collateral attack in the State of Louisiana. Consequently, Petitioner has no pending proceeding in any of the courts of the State of Louisiana.

This pleading is the only petition for a writ of habeas corpus, which Petitioner QUINTERO-CRUZ has filed in federal court.

At trial, Petitioner was represented by undersigned counsel, Robert L. Moore. On direct appeal and all further direct appellate review, Petitioner was represented by undersigned counsel, both Robert L. Moore and Arthur Joel Berger.

Petitioner has no other conviction or sentence in any state or federal court.

Claim Number One

Petitioner Is Being Held In Violation Of The Constitution Of The United States, Because The Prosecutor Utilized Numerous Peremptory Challenges To Exclude African-American Prospective Jurors From Being On His Jury In Violation Of The Prohibition Stated In *Batson v. Kentucky*, 476 U.S. 79 (1986) and *Powers v. Ohio*, 499 U.S. 400 (1991).

Exhaustion Of Available State Remedies: This claim was raised on direct appeal in Point One of Petitioner's

brief and reply brief to the Court of Appeal of Louisiana, Third Circuit. That claim was rejected on the merits. *State v. Velez*, 588 So.2d 116, 124-127 (La. 3d Cir. 1991). Petitioner also raised this claim in his petitions to both the Supreme Court of Louisiana and the Supreme Court of the United States. Therefore, Petitioner QUINTERO-CRUZ has satisfied the requirement of fairly presenting this claim to the Louisiana courts. *Castille v. Peoples*, 489 U.S. 346 (1989); *Vasquez v. Hillery*, 474 U.S. 254, 257-258, 260 (1986); *Smith v. Digmon*, 434 U.S. 332 (1978).

Relevant Facts[1]

On the first day of jury selection, the prosecutor exercised a peremptory challenge against a black juror. The defendants objected to this challenge.[2] Commendably, the trial judge was sensitive to this matter, but evidenced concern that a *Batson*-Article 795(B)[3] claim could not be raised by a defendant, who was not himself a black. Petitioner is Hispanic. Ultimately, the trial judge *sua sponte* requested full argument on this issue, if the defense wanted to pursue it, and expressly stated that he

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[1] The symbol "SR" is used to refer to the supplemental record on appeal, which was filed in the Court of Appeal of Louisiana, Third Circuit.

[2] Prior to the start of jury selection, there was an agreement that an objection and motion made by one of the defendants applied to all of the defendants, unless a particular defendant opted out. (SR. 2646, 2825-2826).

[3] Subsequent to the decision *Batson v. Kentucky*, 476 U.S. 79 (1986), the legislature of the State of Louisiana enacted a law to make a statute out of the *Batson* decision. That statute became Louisiana Code of Criminal Procedure Article 795(B).

wanted to be sure that this issue was preserved. (SR. 2960, 3899-3900, 8949-8950).

On the ninth day of jury selection, the defense began making its *Batson*-Article-795(B) arguments in earnest. The defense maintained that it had standing to raise this claim, especially under the statute. The State responded that it had not used a peremptory challenge against anyone of Colombian nationality and that these defendants lacked standing to challenge the State's exclusion of black jurors. The trial judge ruled that he was overruling the defense objection on the basis of the State's argument. (SR. 5956-5963).

When the defense attempted to make a contemporaneous objection to another exclusion of a black, the trial judge told defense counsel that any *Batson*-type challenge was to be made in the form of a motion for a mistrial after the jury was sworn. (SR. 6175-6176).

The State used all of its thirty-six challenges before the last juror was selected. By the prosecutor's own calculations, fifteen of these peremptory challenges were exercised against black jurors. (SR. 8423, 9015).

At a final argument on this claim, the State again responded that the defense had not met the element of *Batson* that the defendants were of the same race as the excluded black jurors. The trial judge ruled in accordance with the State's position on the *Batson* claim and also held that this ruling applied to the statutory prohibition. (SR. 9005-9023).

After repeated defense objections, one black juror, Ms. Shaw, was selected as the eleventh juror. (SR. 7707, 7865).

During the entire jury selection process, the State never offered to provide even one neutral explanation for peremptorily challenging the black prospective jurors.

Under Louisiana's criminal procedure, a prospective petit juror is immediately sworn as a petit juror, if neither the State nor the defense exercises a peremptory challenge against him or her. La. Code Crim. Proc. Art. 788; *State v. Martin*, 329 So.2d 688, 690 (La. 1976). Restated, Louisiana follows a use-it-or-lose-it procedure for peremptory challenges.[4] Because of this fact, Louisiana procedure can easily expose a pattern in a prosecutor's strikes.

On direct appeal, Petitioner took the simple position that the precise issue of whether Petitioner could raise a *Batson* claim was then pending before the Supreme Court of the United States in a case styled *Powers v. Ohio* and that resolution of that case would be decisive.

In a reply brief, Petitioner honed in on the showing in the record that a *prima facie* case of discrimination was made before the trial court, assuming that Petitioner had standing. The Petitioner specifically referred to the transcript of the *voir dire* of two black prospective jurors, Mrs. Charles and Mr. Cormier, both of whom the State peremptorily challenged. The transcript of the *voir dire* of both of these two prospective petit jurors was included in

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[4] Other jurisdictions permit the procedure of backstriking of prospective jurors, before the jury is sworn in as a single unit.

the appendix to the petition for a writ of certiorari, which Petitioner filed in the Supreme Court of the United States. A copy of that portion of the appendix is attached to this pleading as an exhibit for this Court's own perusal.

The questioning of those two jurors was very brief. Those two jurors were asked the same basic questions by the State that were asked of all of the jurors that were selected to serve on the jury. (SR. 5465-5516, 7526-7585). There is not one neutral reason apparent of record to explain why the State peremptorily challenged prospective jurors Cormier and Charles. Not one answer showed a bias against either the State or the defense. Moreover, these two prospective African-American jurors gave answers to *voir dire* questions, which **cannot** be distinguished from any of the answers received from any of the twelve jurors, who were selected to serve on the jury. (SR. Nunez 3045-3081; Reed 3227-3263; Manual 3390-3435; Mounce 4131-4164; Harnett 4375-4431; Bell 5291-5356; Gary and Dickerson 5853-5953; Matte 6498-6538, 6553-6606; Savant 6714-6832; Shaw 7598-7707; Langley 8293-8294, 8306-8423).

Indeed, the defense exposed what the prosecution was doing by waiving any defense questioning of black prospective juror Charles, following which the State peremptorily challenged Mrs. Charles. Of similar import is the fact that the State announced a peremptory challenge of prospective juror Cormier almost immediately after the first defense attorney began his *voir dire* questioning of Mr. Cormier.

Petitioner maintained that the transcript of the exclusion of prospective jurors Cormier and Charles, itself,

was enough to raise the needed inference that at least these two African-Americans were excluded from jury service because of discrimination against blacks.

Prior to a decision in this case by the Louisiana appellate court, the Supreme Court of the United States decided *Powers v. Ohio*, 499 U.S. 400 (1991). *Powers* vindicated the precise position, which Petitioner had asserted before the trial court.

In its written opinion, the intermediate Louisiana appellate court found that the trial judge rejected Petitioner's *Batson* challenge, because Petitioner QUINTERO-CRUZ was not of the same race as the peremptorily-challenged black jurors. *State v. Velez*, 588 So.2d at 124, 126. That court also recognized the binding nature of the Powers decision on this direct criminal appeal and held that the trial judge erred in his ruling on standing. *State v. Velez*, 588 So.2d at 124-126, 127.

Nevertheless, that Louisiana appellate court refused to reverse. Instead, that appellate court decided to review the cold record in the first instance and made the initial determination that nothing in the transcripts of the jury *voir dire* established a *prima facie* case of discriminatory intent in the selection of the jury. *State v. Velez*, 588 So.2d at 126.

Simply stated, the lower appellate court made the determination that the appellate record conclusively established the absence of a *prima facie* case of racial discrimination by the prosecution in the selection of the jury that tried this case. The reasoning of the lower appellate court is a jumble of numbers and statements, which are entirely lacking in a basic legal theoretical

approach to how to determine whether a *prima facie* case of discrimination is established.

The basis for the Louisiana appellate court's conclusion that the record on appeal did not demonstrate a *prima facie* case of racial discrimination is found in two sentences. That court found that "the record reflects no pattern of strikes against blacks and no systematic exclusion of blacks from this jury." That court summarized its omnibus evaluation, "What we detect from the *voir dire* transcript is the prosecutor's preoccupation with seating jurors open to, and comfortable with, the death penalty, a characteristic she would have understandably desired for all jury members." *State v. Velez*, 588 So.2d at 126. Finally, that state appellate court concluded that "the State did not exercise its peremptory challenges with a discriminatory purpose. Neither the *voir dire* transcript nor the numerical evidence concerning the prosecutor's challenges support such an inference;. . . . " *State v. Velez*, 588 So.2d at 127.

The Petitioner sought review of this intermediate appellate court decision in the Supreme Court of Louisiana. In the pleading, which was filed in that court, the Petitioner asserted that the lower appellate court erred in its determination that no *prima facie* case had been established. Petitioner asserted that the lower appellate court's ultimate conclusion was debunked simply by review of the transcript of the *voir dire* of Mrs. Charles and Mr. Cormier. Contrary to the implication in the lower appellate court's opinion, these transcripts unequivocally establish that both venirepersons Charles and Cormier were open to, and comfortable with, the death penalty. Indeed, both of these African-Americans expressly stated

that they could impose the death penalty not only upon the alleged trigger man, but also the alleged aider and abettor, who was present at the scene of the homicide, and even the alleged non-present co-conspirator. (SR. 5467, 5512-5514, 7527, 7529, 7566-7569). Nothing stated by the lower appellate court neutralized the total absence of a rational explanation for the State's exercise of its peremptory challenge of those two jurors.

There is **absolutely no basis**, which is discernable from the *voir dire* of those two blacks, to explain the State's exercise of its peremptory challenges of them. It is the absence of a discernable explanation that is what calls for an explanation. Worse still is the fact that Mrs. Charles was excused, even though the defense asked no questions of this person and this prospective juror gave no answers favorable to the defense. (SR. 7526-7585). "In the interest of saving time," the State exercised a peremptory challenge against Mr. Cormier, almost immediately after the first defense counsel began his questioning. (SR. 7585). The mere cursory questioning of those two persons, before striking them, which questioning did not elicit an answer that rationally explains the State's peremptory challenge, is evidence giving rise to an inference of discrimination.

Legal Argument

A *Batson* claim is a lawful basis upon which a federal court can issue a writ of habeas corpus to a state prisoner. Where a review of the state court record establishes, as a matter of law, that a criminal defendant has established a *prima facie* case of racial discrimination by the prosecution

in the selection of his petit jury, and where there is no race-neutral explanation to rebut that *prima facie* case as to every black juror, who was peremptorily excluded, the writ will be granted. *Jones v. Ryan*, 987 F.2d 960 (3d Cir. 1993); *Splunge v. Clark*, 960 F.2d 705 (7th Cir. 1992); *Harrison v. Ryan*, 909 F.2d 84 (3d Cir. 1990); *Garrett v. Morris*, 815 F.2d 509 (8th Cir. 1987).

The fact that a single black juror ultimately sits on the jury does not, in itself, rebut a *prima facie* case of discrimination and render the illegal conduct harmless. *Jones v. Ryan*, 987 F.2d 960, 971 (3d Cir. 1993); *United States v. Bishop*, 959 F.2d 820, 827 (9th Cir. 1992); *Harrison v. Ryan*, 909 F.2d 84 (3d Cir. 1990) and cases cited therein; *see Ford v. Georgia*, 498 U.S. 411 (1991) (one black left on jury); *Edmonson v. Leesville Concrete Co., Inc.*, ___ U.S. ___, 111 S.Ct. 2077 (1991) (one black left on jury); *Alvarado v. United States*, 497 U.S. 543 (1990) (*Batson* claim may be valid, even if chosen jury represented a fair cross section of the community).

Petitioner establishes a *prima facie* case if all relevant circumstances, including a pattern of strikes against blacks, *Edmonson v. Leesville Concrete Co., Inc.*, 111 S.Ct. 2077, 2088 (1991), establish merely "a likelihood of impropriety in the exercise of a challenge." *Powers v. Ohio*, 111 S.Ct. 1364, 1372 (1991); *see Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978). Once a *prima facie* case of discrimination is shown, *Batson* requires counsel to justify each challenge with a race-neutral explanation. *United States v. Broussard*, 987 F.2d 215, 220 (5th Cir. 1993).

In this case, the only court to determine the issue of whether a *prima facie* case was made was the Louisiana

intermediate appellate court during direct appeal. That determination was made from the same record that this Court will review.

A factual finding by a state appellate court is entitled to a presumption of correctness, unless one of eight exceptions listed in 28 U.S.C. § 2254(d) is shown to apply. One of the exceptions is where the record does not fairly support the state appellate court's finding. *Miller v. Fenton*, 474 U.S. 104, 117 (1985); *Sumner v. Mata*, 449 U.S. 539, 546-547 (1981); 28 U.S.C. § 2254(d).

Here, the record does not fairly support a finding that prospective jurors Charles and Cormier were excluded for the race-neutral reason that these jurors might be adverse to the State's desire to impose the death penalty.

Likewise, the record does not fairly support a finding that there was absolutely no inference of discrimination in the challenges made to those two prospective African-American jurors. The striking of these two African-American jurors followed mere cursory questioning of those two prospective jurors. That questioning did not elicit an answer that could rationally explain those strikes on the basis of race-neutral reasons. This alone is all that is necessary to create an inference of discrimination. It is the absence of a rational race-neutral explanation appearing in the record that crys [sic] out for an explanation.

An overall view of the prosecutor's exercise of the State's peremptory challenges also adds fuel to the fire. There was an unmistakable pattern of strikes against blacks, given the particular Louisiana procedure for selecting a jury. That pattern is discernable not as much

from the fact that fifteen of the thirty-six peremptory challenges were used against blacks, but most from the fact that fifteen blacks in a row were struck by the prosecutor's use of his peremptory challenges, before the only black juror was accepted. Moreover, that single black juror was selected only after the defense had continuously complained of racial discrimination and only when the prosecution had used up almost all of its peremptory challenges. This bespeaks a pattern. The Louisiana appellate court's conclusory finding to the contrary is not fairly supported by the record.

This record establishes a *prima facie* case of racial discrimination in the selection of Petitioner's petit jury, as a matter of law. Consequently, Petitioner QUINTERO-CRUZ is entitled to the issuance of a writ of habeas corpus on his *Batson* claim.

* * *

[Remainder Of Petition Deleted]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

LUIS CARLOS QUINTERO-CRUZ	CIVIL ACTION NO. 93-2027
VERSUS	JUDGE SHAW/LAKE CHARLES DIVISION
KELLY WARD, WARDEN WADE CORRECTIONAL CENTER	MAGISTRATE JUDGE METHVIN
MIGUEL VELEZ	CIVIL ACTION NO. 94-0120
VERSUS	JUDGE SHAW/ LAFAYETTE-OPELOUSAS DIVISION
KELLY WARD, WARDEN WADE CORRECTIONAL CENTER	MAGISTRATE JUDGE METHVIN

ORDER SETTING EVIDENTIARY HEARING

(Filed Apr. 4, 1995)

Petitioners and a third defendant were tried and convicted of the first degree murder of Adler B. "Barry" Seal following a jury trial in the 14th Judicial District Court, Parish of Calcasieu. Petitioners filed the above captioned habeas corpus cases on November 29, 1993 and January 20, 1994, respectively.

Petitioners have exhausted their state remedies as to all claims presented, with the exception of one of Velez's claims involving a juror note sent to the trial judge during the penalty phase of the trial. The court has not yet made a determination regarding whether this claim may

be addressed on the merits, but Velez has indicated a willingness to drop this claim rather than have his entire petition dismissed for failure to exhaust.

Both Cruz and Velez allege their constitutional rights were violated by the prosecutor's use of peremptory challenges to exclude African-American prospective jurors from being on the jury in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986) and *Powers v. Ohio*, 499 U.S. 400 (1991).

Having carefully reviewed the briefs of the parties, I have determined that an evidentiary hearing should be held as to the *Batson* issues. The remaining issues will be resolved on the briefs of the parties.

IT IS THEREFORE ORDERED that an evidentiary hearing will be held on May 18, 1995 at 9:30 a.m. to receive testimony and other evidence on the issue of whether petitioners are entitled to relief under *Batson* and its progeny. The court will focus particular attention on the issue of whether, if provided the opportunity to present it during the jury selection process, the prosecution had a race-neutral explanation for its peremptory challenges to prospective jurors Mrs. Charles and Mr. Cormier.

IT IS FURTHER ORDERED that the Clerk of Court issue a writ of habeas corpus ad prosequendum to the Warden at David Wade Correctional Center, Homer, Louisiana, to produce Luis Carlos Quintero-Cruz, No. 117059 and Miguel Velez, No. 117060 for the hearing.

IT IS FURTHER ORDERED that the Clerk mail a copy of this order to the Wade Correctional Center at Rt. 2, Box

75, Homer, Louisiana, and/or any other prison where either or both petitioner's may be incarcerated.

Lafayette, Louisiana this 4th day of April, 1995.

/s/ Mildred E. Methvin
MILDRED E. METHVIN
United States Magistrate Judge
705 Jefferson St, Suite 207
Lafayette, La. 70501

(318) 262-6651 (Phone)
262-6830 (Fax)

[TR. 1] UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

MIGUEL VELEZ, Plaintiff, VERSUS KELLY WARD, Warden Wade Correction Center, Defendant.	*	Docket No. CV94-120 July 12, 1995 9:30 a.m. Lafayette, Louisiana

****

LUIS CARLOS QUINTERO-CRUZ, Plaintiff, VERSUS KELLY WARD, Warden Wade Correctional Center, Defendant.	*	Docket No. CV93-2027

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REPORTER'S OFFICIAL TRANSCRIPT OF EVIDENTIARY HEARING

BEFORE THE HONORABLE MILDRED E. METHVIN, UNITED STATES DISTRICT MAGISTRATE JUDGE.

* * *

[TR. 5] THE COURT: As counsel know, the court is aware that the petitioners have raised – Mr. Cruz has raised two issues in his habeas petition; and Mr. Velez

has raised three. But this hearing is limited to the issue of the Batson challenge which has been raised.

* * *

[TR. 19] THE COURT: All right. I will now turn the hearing over to counsel with the reminder that under 28 U.S.C. Section 2254, the burden of proof is on the petitioners by clear and convincing evidence. I also want to make clear that by having this evidentiary hearing, there is no finding by this court that there was a inadequate factual record made by the State court. There is no finding that the defendants or petitioners were deprived of a full and fair hearing in State court. In fact, none of the factors under Section 2254(d) have been found at this juncture. The court is having this evidentiary hearing as a discretionary matter. The burden remains on the petitioners to prove that one of the factors in Section 2254(d) exists or proving that the factual determination made by the State [TR. 20] court is not supported by the record.

* * *

[TR. 37] PREMILA BURNS,
DEFENDANT'S WITNESS, SWORN

DIRECT EXAMINATION

BY MS. THOMPSON:

Q Please state your name and occupation for the record.

A My name is Primela Burns. I'm an attorney at law, and specifically I'm Assistant District Attorney for the 19th Judicial District, Parish of East Baton Rouge, State of Louisiana.

Q And are you familiar with State versus Luis Carlos-Quintero Cruz, Miguel Velez, and Bernardo Antonio Vasquez?

A Yes, I am. I was the lead prosecutor in that trial proceeding.

* * *

[TR. 39] Q Do you recall from that S-1 there the breakdown according to race and sex that you noted?

A Yes. I noted that of the thirty-six peremptory challenges exercised by the State, fifteen were exercised against black jurors, twenty-one were exercised against white jurors; and further breaking it down by gender, fifteen males were struck by the State, twenty one females were struck peremptorily.

* * *

[TR. 58] A I skipped one, counsel. Mr. Cormier, I skipped before that, Juror 261. Should have been the thirteenth challenge. Not Ms. Fontenot. That would be 261, Hodges Cormier, who was excused on April the 22nd, who was a black male; and I distinctly remember this man. He was what I would call a creole black male. It was very obvious to me that he was a homosexual; and at the time he came up for counsel, I questioned him. But my co-counsel and I looked to each other, kind of chortled to each other. He was questioned; but at the time he was actually tendered to the defense, the State exercised its peremptory challenge. We had no intention of keeping this man on the jury given his [TR. 59] very obviously orientation.

Q Were there any other reasons for your challenge for him?

A He had indicated as well to the judge he recently had cut his foot, stitches in his foot. And being impaneled on a sequestered jury at some point would have to have the stitches removed as well. Ms. Fontenot would then be the fourteenth strike.

* * *

[TR. 153] THE COURT: I suggest you do it very promptly. Anything further? All right. Then the court will await your briefs. And thank you again for your participation. Court stands in recess.

COURT ADJOURNED AT 3:00 P.M.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
Lake Charles Division

CIVIL ACTION NO. 93-2027
Judge JOHN M. SHAW
Magistrate Judge MILDRED METHVIN

LUIS CARLOS QUINTERO-CRUZ, Petitioner, vs. KELLY WARD, Warden of David Wade Correctional Center; et al. Respondents.	**SUPPLEMENTAL MEMORANDUM OF LAW**

The Petitioner, LUIS CARLOS QUINTERO-CRUZ, by and through undersigned counsel files this Supplemental Memorandum Of Law and supplements his petition with argument on the following legal issues that arose during the hearing held by Magistrate Judge Methvin and states:

I.

STATUTORY PRESUMPTION OF CORRECTNESS

Congress has mandated that the federal courts must presume correct "a determination . . . of a *factual* issue" made by a State trial or appellate court. 28 U.S.C. § 2254(d); *Wainwright v. Goode*, 464 U.S. 78 at 86 (1983). This Court has called into question how that statutory command is to be applied to the *Batson* issue before this Court.

In this case, there is no dispute that the state trial court never engaged in the legal analysis required by *Batson v. Kentucky*, 476 U.S. 79 (1986).

Likewise, there can be no dispute that the state appellate court only addressed the first step in the *Batson* inquiry. The intermediate Louisiana appellate court held that "based on our review of the voir dire transcript" there was an "absence of a prima facie showing of discrimination." *State v. Velez*, 588 So.2d 116 at 126 (La. 3d Cir. 1991). Later in that opinion, this appellate court wrote:

> The facts in this case do not establish a prima facie case of purposeful discrimination. We conclude, . . . , the State did not exercise its peremptory challenges with a discriminatory purpose. Neither the voir dire transcript nor the numerical evidence concerning the prosecutor's challenges supports such an inference; accordingly, the State was under no obligation to present racially neutral reasons for each peremptory challenge of a black venireperson. . . . [T]he trial judge ultimately did not err in denying defendant's motion for mistrial based on the State's exercise of its peremptory challenges against blacks because no prima facie showing of purposeful discrimination was made.
>
> *State v. Velez*, 588 So.2d 116 at 128 (La. 3d Cir. 1991).

The state appellate court's first-step finding that a prima facie case was not established by the defendants is not an historical fact, even though there are subsidiary factual matters which themselves would be entitled to a presumption of correctness. *See Miller v. Fenton*, 474 U.S.

104 at 112 (1985). Step one of a *Batson* analysis addresses whether the totality of the facts establish a prima facie case. A ruling on that issue is similar to the concept of ruling on a motion for a judgment as a matter of law – formerly, a motion for a directed verdict – in a civil discrimination case. Thus, federal habeas corpus review of a step-one issue must be deemed either a question of law or a mixed question of fact and law. *See St Mary's Honor Center v. Hicks*, ___ U.S. ___, 113 S.Ct. 2742 (1993); *Furnco Const. Corp. v. Waters*, 438 U.S. 567 at 575 (1978); *In re Letterman Brothers Energy Securities Litigation*, 799 F.2d 967 at 971-972 (5th Cir. 1986).[1] Consequently, a state court finding that a prima facie case was not established is a finding that is not entitled to a presumption of correctness.[2] *See Johnson v. Love*, 40 F.3d 658 at 661 (3d Cir. 1994); *cf. Miller v. Fenton*, 474 U.S. 104 (1985).

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[1] The burden of establishing a prima facie case of discrimination is not onerous. *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977 at 986 (1988); *Texas Dept. of Community Affairs*, 450 U.S. 248 at 253 (1981).

Obviously, the analysis employed to determine step one of a *Batson* claim is not the same as that to determine the ultimate issue resolved at step three of the *Batson* analysis. *See Purkett v. Elem*, ___ U.S. ___, 115 S.Ct. 1769 (1995).

[2] Because a Louisiana trial court never heard and evaluated an explanation from a prosecutor as to why any black juror was peremptorily challenged, no *Batson* step-three finding was made based on a judicial credibility determination. Consequently, in this case, the ultimate constitutional issue posed by *Batson* cannot be resolved by application of a presumption of correctness. *Compare Purkett v. Elem*, ___ U.S. ___, 115 S.Ct. 1769 (1995).

It is clear from the wording of its opinion that the Louisiana appellate court never went beyond step one. Since no

That Louisiana state appellate court did make the following findings of historical facts that are not disputed, that do appear from the trial transcript, and that are entitled to a presumption of correctness. *Sumner v. Mata*, 449 U.S. 539 (1981).

> The record before us reveals the following circumstances. Over 300 venirepersons were interviewed during voir dire. The prosecutor was given 36 peremptory challenges and exercised 21 challenges on whites and 15 challenges on blacks. The prosecutor asked similar questions of black and white prospective jurors and spent generally as much time questioning blacks as whites. Approximately eight blacks were excused because of reservations concerning the death penalty, just as numerous whites were excused for the same reason. One black female was seated on the jury and the prosecutor accepted a black who was excluded by defense counsel, both of which occurred before the State exhausted its peremptory challenges.
>
> The defendants had no racial identity with the challenged jurors, although it is true they were members of minority groups. The defendants were charged with first degree murder

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explanation was ever required from the prosecution by the trial judge and since that appellate court was only reviewing a cold transcript of what occurred at the trial level, there was no explanation for the appellate court to evaluate. Moreover, that appellate court could not make a credibility determination. Thus, even if the state appellate court had done so, any ultimate finding regarding step three, when done for the first time at the appellate level, would not be entitled to a presumption of correctness in the same manner as would occur when the step-three determination is made by the trial court. *See Amos v. Scott*, 61 F.3d 333 at 347 (5th Cir. 1995).

> which requires a unanimous verdict, discounting an inference that the prosecutor may have allowed a minimum number of blacks on the jury because their votes may not ultimately count, such as in a noncapital case which requires the concurrence of only ten jurors for a guilty verdict. * * *
>
> *State v. Velez*, 588 So.2d 116 at 126 (La. 3d Cir. 1991)

Petitioner does take the position that the following two sentences of the appellate court opinion are not entitled to a presumption of correctness. As a matter of statutory law, Petitioner Cruz has the burden of establishing applicability of a statutory exception. 28 U.S.C. § 2254(d).[3] If this Court determines that these two sentences determine an historical fact, this Court must explain the reasoning in support of its conclusion that these two sentences are not entitled to a presumption of correctness. *Burden v. Zant*, 498 U.S. 493 (1991); *Sumner v. Mata*, 449 U.S. 539 at 551 (1981).

The first disputed sentence is the following:

> * * * Finally, we note the record reflects no pattern of strikes against blacks and no systematic exclusion of blacks from this jury. * * *
>
> *State v. Velez*, 588 So.2d 116 at 126 (La. 3d Cir. 1991)

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[3] The burden of proving that a statutory exception applies is not the same as the burden of proving that a factual finding by the state court, to which a presumption applies, is an erroneous finding. In that latter situation, the burden of proof is by convincing evidence. 28 U.S.C. § 2254(d).

To the extent that this sentence is deemed an historical fact, it is not entitled to a presumption of correctness. Louisiana follows a "use-it-or-lose-it" method of jury selection. If a prospective juror is not peremptorily challenged, that prospective juror becomes a member of the jury. Consequently, any pattern of strikes and any systematic exclusion become clearer as the number of blacks, who were struck, increases. In this case, a total of fifteen blacks were stuck [sic] by the State. Ten of those fifteen prospective black jurors were stricken before the State accepted black juror Washington on April 19th.[4] Five more black jurors in a row were struck before the State accepted black prospective juror Shaw on April 22nd. Prospective black juror Charles was struck before Washington was accepted by the State, while prospective black juror Cormier was eliminated after Washington was accepted by the State.

These undisputable additional facts from the same cold transcripts that the Louisiana appellate court reviewed must be deemed to satisfy the definition of the phrases "pattern of strikes" and "systematic exclusion." Given the large number of blacks involved in the exercise of the State's peremptory challenges, that Louisiana appellate court's characterization cannot be sustained.[5] If this particular sentence is taken as a finding of historical

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[4] Mr. Velez struck that juror.

[5] One may not be able to use these phrases in a situation where, for example, only three prospective jurors are black and two – or even three – are eliminated by the prosecution. By contrast, in this case the sample size of black prospective jurors is large enough to characterize.

fact, this sentence is not entitled to a presumption of correctness, because that finding is not fairly supported by the record.[6] That latter situation is a statutory exception to the applicability of the requirement that a particular finding is presumed correct. 28 U.S.C. § 2554(d)(8); *Wainwright v. Goode,* 464 U.S. 78 at 86 (1983).

The second disputed sentence is the following:

> * * * What we detect from the voir dire transcript is the prosecutor's preoccupation with seating jurors open to, and comfortable with, the death penalty, a characteristic she would have understandably desired for all jury members.
>
> *State v. Velez,* 588 So.2d 116 at 126 (La. 3d Cir. 1991)

That statement must be presumed correct and must be accepted by this Court. However, it must be understood that this statement cannot explain all of the State's peremptory challenges leveled against black prospective jurors. Again, one need only review the transcript in so far as the voir dire inquiry of prospective black jurors Charles and Cormier to determine that this factual finding is not fairly supported by the record to the extent that the appellate court intended that statement to justify every peremptory challenge.

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[6] Because the cold transcript is the only basis for the Louisiana appellate court's finding and, therefore, because credibility does not enter into the calculus, it is not difficult to determine that this finding is not supported by the record.

The federal habeas corpus concept of a presumption of correctness cannot be the entire basis for disposing of Petitioner Cruz' *Batson* claim.

The following is important to emphasize. There are historical facts appearing from the transcript of the trial that were never mentioned by the state appellate court. For example, what the transcript shows about the voir dire questioning of prospective black jurors Cormier and Charles is nowhere mentioned by the State appellate court. Those voir dire excerpts have already been provided to this Court as an exhibit to the petition and need not be discussed in any detail in this memorandum. Even though some factual matters are entitled to a presumption of correctness by this Court, this Court may properly make additional findings of fact so long as they do not conflict with the findings of fact made by the state court and are adequately supported by the record. *See Brewer v. Williams*, 430 U.S. 387 at 396 (1977). Indeed, this Court cannot ignore undisputed facts, which appear from the transcript, merely because those additional facts do not support the Louisiana appellate court's disposition of the *Batson* claim.

II.

CONTEMPORANEOUS OBJECTION

During the course of this federal court hearing, this Court suggested that there were not contemporaneous objections on *Batson* grounds to each of the fifteen prospective black jurors. The inference derived from this

Court's remarks was that this Court believed that Petitioner waived any claim as to the striking of some of the fifteen jurors. This line of reasoning is legally erroneous.

Under Louisiana law, a criminal defendant's *Batson* objection is timely for the purpose of a *Batson* claim, even if it is not made until after several black jurors have been stricken. The test of whether a contemporaneous objection on *Batson* grounds has been made is whether a *Batson* objection was made by the defendant before completion of the jury panel. *State v. Collier,* 553 So.2d 815 at 818 n.4 (La. 1989). Consequently, on federal habeas corpus review of this Louisiana conviction, this Court cannot apply a different rule of law and employ the contemporaneous objection rule to bar Petitioner from challenging the prosecution's peremptory challenge of any of the fifteen prospective black jurors. *Compare Jones-Butler,* 864 F.2d 348 (5th Cir. 1988).

The concept of the need for a contemporaneous objection, as that applies in federal habeas corpus litigation, *see Wainwright v. Sykes,* 433 U.S. 72 (1977), is a non-issue in this case.

III.

BURDEN OF PROOF

This Court indicated that Petitioner Cruz had to prove his claim of a *Batson* violation by clear and convincing evidence. That is the wrong legal standard.

In federal habeas corpus litigation, a defendant has a burden of proving his claim by a preponderance of the

evidence. *Harned v. Henderson,* 588 F.2d 12 (2d Cir. 1978); 16 Fed. Pro., L.Ed. *Habeas Corpus* § 41: 384 (1983).

IV.

ESTABLISHMENT OF A PRIMA FACIE CASE

The following new federal habeas corpus cases further support Petitioner Cruz' position that the record establishes a prima facie case of a racial discrimination by the prosecution in the selection of the jury. *Turner v. Marshall,* ___ F.3d ___, 57 Cr. L. Rptr. 1443 (9th Cir. August 2, 1995); *Johnson v. Love,* 40 F.3d 658 (3d Cir. 1994).

Respectfully submitted,
Counsel for Petitioner Cruz

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LUIS CARLOS QUINTERO-CRUZ	CIVIL ACTION NO. 93-2027 LAKE CHARLES DIVISION
VERSUS	JUDGE SHAW
KELLY WARD, WARDEN, WADE CORRECTIONAL CENTER	MAGISTRATE JUDGE METHVIN

* * *

MIGUEL VELEZ	CIVIL ACTION NO. 94-0120 LAFAYETTE-OPELOUSAS DIVISION
VERSUS	JUDGE SHAW
KELLY WARD, WARDEN, WADE CORRECTIONAL CENTER	MAGISTRATE JUDGE METHVIN

REPORT AND RECOMMENDATION

(Filed Jul. 19, 1996)

Luis Carlos Quintero-Cruz and Miguel Velez were convicted of first-degree murder in 1987 following a five-week jury trial in the Fourteenth Judicial District Court, Calcasieu Parish, Louisiana. Petitioners are currently serving life sentences. Petitioners each filed an application for habeas relief under 28 U.S.C. §2254. Since petitioners were tried together and their habeas claims overlap, this report and recommendation will address both habeas petitions.

Among other claims, Velez and Cruz each allege a violation of their constitutional rights under *Batson v. Kentucky*, 476 U.S. 79, 90 L.Ed.2d 69, 106 S.Ct. 1712 (1986). An evidentiary hearing on the *Batson* issue was held July 12, 1995. At the request of the parties, a transcript of the hearing was provided for purposes of filing post hearing briefs. The briefs were filed by October 19, 1995, and the matter was taken under advisement. Considering the facts presented at the hearing, and the briefs of the parties, I conclude that petitioners are not entitled to habeas relief.

BACKGROUND

A full recitation of the background of this case is accurately set forth in the opinion by the Louisiana Third Circuit Court of Appeal affirming the convictions of Velez and Cruz. *State v. Velez*, 588 So.2d 116 (La.App.3d Cir.1991). A copy of the opinion is attached hereto as "Appendix A." For purposes of this report, a brief summary will suffice.

The murder victim, Barry Seal, had been a pilot and drug smuggler for the Medellin Cartel, a Columbian cocaine enterprise. After Seal's apprehension and conviction in federal court in Florida, Seal became a government informant. As a result of Seal's cooperation, indictments were brought against Pablo Escobar and Jorge Ochoa, two of the top men in the Medellin Cartel. Ultimately, because of his cooperation with the federal government, Seal's ten-year sentence in Florida was reduced to time served. Pursuant to his agreement with the federal government, Seal pled guilty to additional

drug charges in the Middle District of Louisiana, allegedly with the understanding that he would receive no harsher sentence than that which had been imposed in Florida. However, at his sentencing, Judge Polozola ordered Seal to serve six months in a Baton Rouge halfway house as a condition of his probation. Seal was required to report to the halfway house at 6:00 p.m. each day, spend the night, and leave the following morning at 7:00 a.m. As predicted by his attorney, Seal was murdered three weeks later, on February 19, 1986, as he arrived at the halfway house.

Velez, Cruz, and co-defendant Antonio Vasquez were indicted in the Nineteenth Judicial District Court, East Baton Rough Parish on charges of first-degree murder for the contract killing of Seal. The trial was transferred to Lake Charles due to extensive pretrial publicity. Jury selection took three weeks, and the trial took five weeks. At the conclusion of the trial, the 12-person jury unanimously found each of the defendants guilty of first-degree murder[1]. At the penalty phase of the trial, the jury recommended life sentences without benefit of parole, probation or suspension of sentence.

* * *

Cruz raises two issues: (1) the identical *Batson* issue raised by Velez; and (2) the trial court erred in refusing to

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[1] The Louisiana Third Circuit Court of Appeals reversed Vasquez' conviction and remanded his case for entry of judgment of second-degree murder. His conviction is not before the court.

give a special jury instruction regarding the unreliability of eyewitness testimony.

EXHAUSTION OF REMEDIES

Both petitioners appealed their convictions. Velez raised the following assignments of error: (1) the trial court erred in allowing the state to use its peremptory challenges improperly to exclude jurors on the basis of race; (2) the trial court erred in allowing other crimes evidence to be presented to the jury; (3) the trial court erred in failing to require the state to produce certain information about two of the state's witnesses, Luis Carlos Uribe-Munera and Max Mermelstein; (4) the trial court erred in denying the motion to suppress the results of a gunshot residue test performed on petitioner thirteen hours after the murder occurred; (5) the trial court erred in refusing to suppress the identification of petitioner by Robert Lane; (6) the trial court erred in denying petitioner's motion to re-poll the jury, conduct an evidentiary hearing, or grant a new trial based on an invalid verdict as evidenced by a single note sent to the trial judge by two jurors after the guilt phase and during the penalty phase of the trial; and (7) petitioner's conviction was based on insufficient evidence.

Petitioner Cruz raised some of the same assignments of error as Velez, specifically grounds No. 1, 2, 3, and 6 set forth above. Cruz also raised the following issues: (1) the trial court erred in refusing to allow Dr. Gary Wells, proffered as an expert witness in the field of eyewitness identification, to testify and in refusing to hold an evidentiary hearing regarding the liability and admissibility

of witness Benny Louis' identification testimony; (2) the trial court erred in not providing a transcript of the jury charge conference at which the defense unsuccessfully argued entitlement to a special instruction on eyewitness identification; and (3) the trial court erred in denying petitioner's request for a special jury instruction regarding evaluation of eyewitness identification testimony.

The Third Circuit affirmed petitioners' convictions. *State v. Velez,* 588 So.2d 116 (La.App.3d Cir.1991). The Louisiana Supreme Court denied petitioners' application for writs. *State v. Velez,* 592 So.2d 408 (La.1992). The U. S. Supreme Court denied petitioners' application for certiorari. *Quintero Cruz v. Louisiana,* ___ U.S. ___, 112 S.Ct. 3031, ___ L.Ed.2d ___ (1992).

The State concedes that petitioners have exhausted their state remedies as to all issues with the exception of a second juror note sent to the trial judge during the penalty phase of the trial. I find that with the exception of the second juror note, the issues presented in the instant petition were previously presented to the Louisiana courts on direct review.

* * *

The record clearly reflects that petitioners have not exhausted available state remedies as to the second juror note. Neither have they demonstrated that exceptional circumstances exist which would warrant waiver of the exhaustion policy by this court. This court is authorized to dismiss a federal habeas petition which reveals either on its face or upon review of the entire record that the requirement of exhaustion of state remedies has not been satisfied. *Deters supra; Resendez v. McKaskle,* 722 F.2d 227,

231 (5th Cir. 1984). However, in view of the petitioners' request to withdraw the unexhausted claim in lieu of dismissal of this mixed petition, I conclude that dismissal is not required. The issue as to the second juror note will be considered withdrawn. However, in the event the court should conclude that the claim as to the second juror note has been adequately exhausted, the analysis on the merits set forth below is equally applicable to both notes.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. BATSON ISSUE

The Law

Before addressing the facts of this case, it is helpful to review the applicable law so that this court can properly assess whether the findings of the Louisiana Third Circuit Court of Appeal are legally and factually sound, and concomitantly whether the factual findings are entitled to a presumption of correctness.

The use of peremptory challenges to exclude persons from a petit jury on the basis of their race or gender violates the Equal Protection Clause of the Fourteenth Amendment. In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Supreme Court set forth a three-step test for evaluating whether a prosecutor's use of peremptory challenges is race-based in violation of equal protection. The test was later modified by *Powers v. Ohio*, 499 U.S. 4900, 415 (1991).

First, the defendant must establish a prima facie case of intentional racial discrimination by showing that: (1) the defendant is a member of a cognizable racial group;

(2) the group's members (or, as modified by *Powers*, any other cognizable racial group) have been excluded from defendant's jury; and (3) the circumstances of the case raise an inference that the exclusion was based on race.

Second, once a prima facie showing of intentional discrimination is established, the burden shifts to the proponent of the peremptory challenge to offer a facially race-neutral explanation. This explanation must be more than an assertion of good faith, or an assumption that the juror's race would make him partial to the defendant, but it need not be "persuasive, or even plausible." *Purkett v. Elem*, ___ U.S. ___, 115 S.Ct. 1769, 1771, 131 L.Ed.2d 834 (1995) (per curiam).

Finally, the court must determine whether the explanation is facially race-neutral and whether the opponent of the peremptory challenge has proven purposeful racial discrimination. This assessment turns largely upon the court's evaluation of the credibility of the party exercising the challenge. *Id.*, 115 S.Ct. at 1770-71. *See also Hernandez v. New York*, 500 U.S. 352 (1991) (plurality opinion).

The Facts

Jury selection in the instant case took place between April 6 and April 23, 1987. More than 300 jurors were examined during voir dire. The prosecutor, Premila Burns, used 15 peremptory challenges against black prospective jurors and 21 against whites. Counsel for Velez and Cruz made contemporaneous objections as to some

of these challenges.[3] The 12-member jury finally selected included eleven whites and one black. Only one juror of petitioners' race (Hispanic) was called during voir dire, and he was excluded for cause.[4]

The trial jury overruled the defendants' *Batson* objections as to the challenged black jurors, finding that since the defendants were of a different race (Hispanic) than the jurors in question, they lacked standing to object. Indeed, *Batson*, which was decided in April 1986, required the defendant to show that the prosecutor had exercised peremptory challenges to remove from the venire members of his ***own*** race. Concluding that *Batson* was inapplicable, the trial judge refused to require the prosecutor to enunciate a race-neutral explanation for the disputed challenges.

While the instant case was on appeal before the Louisiana Third Circuit of Appeal, the U. S. Supreme Court decided *Powers, supra.* In *Powers,* the Supreme Court held that the discriminatory use of peremptory challenges jeopardizes the integrity and fairness of the judicial process, an interest which ***any*** defendant has standing to

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[3] At the evidentiary hearing, petitioners' counsel, who were also trial counsel, asserted that their *Batson* objections were enunciated as to all of the State's challenges. However, notes of the prosecutor made simultaneously with the voir dire show that no contemporaneous objections were made as to some of the peremptory challenges. This discrepancy is not material as the state court addressed all of petitioner's *Batson* claims on the merits, and did not rule on the basis of procedural default.

[4] *See* Memorandum in Opposition to Petition, Record Doc. 18, p. 14.

raise via a *Batson* objection. *Powers* instructed that racial identity between the defendant and the challenged jurors is only one factor to be considered in determining whether the defendant has made a prima facie showing of discrimination.

In light of *Powers*, the Third Circuit concluded that the trial judge had improperly based his decision on standing. The court nevertheless affirmed the lower court's ultimate conclusion that no *Batson* violation had occurred. After an examination of the record, particularly the voir dire transcript, the court concluded that defendants had failed to make a prima facie showing of discrimination as required by *Batson*.

Presumption of Correctness

In habeas cases, the factual findings of state courts are presumed to be correct. 28 U.S.C. §2254(d). Absent procedural error, such factual findings may be set aside "only if they are 'not fairly supported by the record.' " *Purkett*, 115 S.Ct. at 1771 (quoting §2254(d)(8) and citing *Marshall v. Lonberger*, 459 U.S. 422, 432 (1983)); *Kuhlmann v. Wilson*, 477 U.S. 436, 441, 106 S.Ct. 2616, 2620, 91 L.Ed.2d 364 (1986).

Contrary to petitioners' assertions, a trial court's finding that no prima facie *Batson* violation has been established is a finding of fact, not a finding of law or a mixed question of fact and law. *See Senegal v. White*, 881 F.Supp 1421 (N.D.Ca. 1995), and cases cited therein; *United States v. Vasquez-Lopez*, 22 F.3d 900 (9th Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 239, 130 L.Ed.2d 162 (1994).

Such *Batson* findings are entitled to a deferential standard on review. *Purkett,* 115 S.Ct. at 1771-1772.

At the outset of the evidentiary hearing held on the *Batson* issue, the parties were advised that they should draw no inference from the fact that a hearing was being held with respect to the issue of whether the Third Circuit's findings would be accorded a presumption of correctness. In other words, the parties were not to presume that since this court had scheduled an evidentiary hearing, it had already concluded that the state court's findings were not supported by the record or were otherwise not entitled to the presumption under §2254(d).

An evidentiary hearing under §2254 is proper with or without a finding as to the presumption of correctness. Section 2254(d) specifically states:

> And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

28 U.S.C. §2254(d). By its clear language this provision indicates that a federal court need not conclude that some defect exists in the state court proceeding in order to hold

and evidentiary hearing in a habeas matter. More important, unless and until the federal court finds that one of the exceptions applies to deprive the state court findings of the presumption of correctness, "the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous."

Turning to the case at hand, the Third Circuit made the following factual findings in concluding that defendants failed to establish prima facie *Batson* violation:

> The record before us reveals the following circumstances. Over 300 venirepersons were interviewed during voir dire. The prosecutor was given 36 peremptory challenges and exercised 21 challenges on whites and 15 challenges on blacks. The prosecutor asked similar questions of black and white prospective jurors and spent generally as much time questioning blacks as whites. Approximately eight blacks were excused because of reservations concerning the death penalty, just as numerous whites were excused for the same reason. One black female was seated on the jury and the prosecutor accepted a black who was excluded by defense counsel, both of which occurred before the State exhausted its peremptory challenges.
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> The defendants had no racial identity with the challenged jurors, although it is true they were all members of minority groups. The defendants were charged with first degree murder which requires a unanimous verdict, discounting an inference that the prosecutor may have allowed a minimum number of blacks on the jury because their votes may not ultimately

> count, such as in a noncapital case which requires the concurrence of only ten jurors for a guilty verdict. *Finally, we note the record reflects no pattern of strikes against blacks and no systematic exclusion of blacks from this jury. What we detect from the voir dire transcript is the prosecutor's preoccupation with seating jurors open to, and comfortable with, the death penalty, a characteristic she would have understandably desired for all jury members.*

State v. Velez, 588 So.2d at 126.[5]

With the exception of the two italicized sentences, petitioners do not dispute the factual findings of the Third Circuit quoted above, and admit that they are entitled to a presumption of correctness under 28 U.S.C.

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[5] Based upon its findings of fact, the Third Circuit concluded as follows:

> The facts presented in this case do not establish a prima facie case of purposeful discrimination. We conclude, as did the *Thompson* court, the State did not exercise its peremptory challenges with a discriminatory purpose. Neither the voir dire transcript nor the numerical evidence concerning the prosecutor's challenges support such an inference; accordingly, the State was under no obligation to present racially neutral reasons for each peremptory challenge of a black venireperson. While it is true the trial judge incorrectly determined that defendants did not have standing to object under *Batson*, the trial judge ultimately did not err in denying defendants' motion for mistrial based on the State's exercise of its peremptory challenges against blacks because no prima facie showing of purposeful discrimination was made.

State v. Velez, 588 So.2d at 127.

§2254(d).[6] The two disputed sentences will be addressed in turn.

Petitioners first contend that the finding of the Third Circuit that "the record reflects no pattern of strikes against blacks and no systematic exclusion of blacks" is not supported by the record and therefore is not entitled to a presumption of correctness. Petitioners argue as follows:

> * * * Louisiana follows a "use-it-or-lose-it" method of jury selection. If a prospective juror is not peremptorily challenged, that prospective juror becomes a member of the jury. Consequently, any pattern of strikes and any systematic exclusion become clearer as the number of blacks, who were struck, increases. In this case, a total of fifteen blacks were struck by the State. Ten of those fifteen prospective black jurors were stricken before the State accepted black juror Washington on April 19th. Five more black jurors in a row were struck before the State accepted black prospective juror Shaw on April 22nd. * * *

(*Cruz* Supplemental Memorandum of Law, Rec. Doc. 47, p. 6).

It should first be noted that the Third Circuit's finding that there was "no pattern of strikes against blacks" must be interpreted as meaning there was no *discriminatory* pattern of strikes against blacks. Clearly there was some "pattern" of strikes against blacks just as there was

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[6] Cruz's Supplemental Memorandum of Law (post-hearing brief), (*Cruz* Rec. Doc. 47, pp. 4-5). Velez was allowed to adopt Cruz's post-hearing brief. (*Velez* Rec. Doc. 45).

a "pattern" of strikes against whites. The record shows that the prosecutor exercised 15 of her 36 peremptory challenges against black jurors in the following order: Peremptory Challenge Nos. 1, 3, 8, 10, 16, 19, 21, 23, 24, 26, 29, 31, 32, 34, 36.[7] The intervening challenges were exercised against whites. Even assuming that ten blacks in a row were peremptorily challenged by the prosecution before a black juror was accepted, this alone is insufficient to establish an inference of discriminatory intent – the third factor required to establish a prima facie *Batson* violation – if other factors show otherwise. "There is no magic number of challenged jurors which shifts the burden to the government to provide a neutral explanation for its actions. Rather the combination of circumstances taken as a whole must be considered." *United States v. Chinchilla*, 874 F.2d 695, 698 (9th Cir. 1989). *See also Vasquez-Lopez, supra*, 22 F.3d at 902 ("[I]t is not per se unconstitutional, without more, to strike one or more Blacks from the jury. A district court must consider the relevant circumstances surrounding a peremptory challenge.").

In determining whether an inference of discrimination should be drawn from a prosecutor's exercise of peremptory challenges, a court may consider any relevant circumstances, including the following: (1) the number of racial group members in the venire panel; (2) the nature of the crime; (3) the race of the defendant and victim; (4) a pattern of strikes against racial group members; and (5) the prosecution's questions and statements

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[7] *See* State's Exhibit No. 1 introduced at the evidentiary hearing, as well as transcript of the hearing, pp. 37-60.

during voir dire. *Simmons v. Beyer,* 44 F.3d 1160, 1167 (3d Cir.), *cert. denied,* 116 S.Ct. 271 (1995).

The Third Circuit carefully reviewed the record of voir dire and considered all of the factors listed above in addition to several others. The court found that approximately eight blacks and numerous whites were excused because of reservations concerning the death penalty; that one black was seated on the jury and another was accepted by the prosecutor but was excluded by defense counsel; and that the prosecutor had accepted both blacks before the State exhausted its peremptory challenges. The record of voir dire is succinctly summarized in the state's brief as follows:

> * * * In the instant case, the state challenged more white jurors than black jurors. At the conclusion of voir dire, twenty-one white jurors had been challenged by the state and only fifteen blacks were challenged by the state. (SR vol.34 p. 9015) Also, a careful review of the record reveals that the prosecutor asked the same questions of each juror during voir dire. On each examination, the prosecutor began by explaining the first degree murder statute and the concept of principals to a crime. The state further gave examples wherein people were not present at the time offenses were committed but were principals to the crimes. The prosecutor then explained the burden of proof and that there must be three separate verdicts in the instant case. She explained the two phases of the trial, i.e., guilt phase and sentencing phase, asked the jurors if they could sentence someone to death, and then explained a contract killing. The prosecutor asked the jurors individually if they

> would fault the victim because he was a convicted drug smuggler; the prosecutor also asked each juror if he could treat petitioner fairly even though petitioner was not a United States citizen. Finally, the prosecutor explained circumstantial evidence to each juror and gave examples of circumstantial evidence to each juror.
>
> Given the pattern of neutral questions asked by the prosecutor of every juror regardless of his race and the fact that twenty-one white jurors were challenged and only fifteen black jurors were challenged the state contends no prima facie showing was made by the defense at trial. The relevant circumstances of this case do not create any inference of purposeful discrimination.

(Memorandum of the State, *Velez* Rec. Doc. 18, pp.15-16).

Considering the foregoing, I conclude that the Third Circuit's factual determination that there was "no pattern of strikes against blacks and no systematic exclusion of blacks from [the] jury" is entitled to a presumption of correctness.

The second factual finding which petitioners challenge is the Third Circuit's statement that, "[w]hat we detect from the voir dire transcript is the prosecutor's preoccupation with seating jurors open to, and comfortable with, the death penalty, a characteristic she would have understandably desired for all jury members." *State v. Velez*, 588 So.2d at 126. Petitioners concede that the

latter statement is a factual finding entitled to a presumption of correctness[8], but argue that:

> [T]his statement cannot explain all of the State's peremptory challenges leveled against black prospective jurors. Again, one need only review the transcript in so far (sic) as the voir dire inquiry of prospective black jurors Charles and Cormier to determine that this factual finding is not fairly supported by the record to the extent that the appellate court intended that statement to justify every peremptory challenge.

(*Cruz* Supplemental Memorandum (adopted by Velez), Rec. Doc. 47, p.8). I find this argument without merit. For the reasons stated above, I find that the Third Circuit correctly applied the *Batson* rule, and entered detailed factual findings which are supported by the record and which are entitled to a presumption of correctness. Petitioners' argument with respect to prospective jurors Charles and Cormier will be discussed in more detail below.

Evidentiary Hearing

Petitioners focus their *Batson* claims on the peremptory challenges exercised against two particular black jurors, Rosa M. Charles and Hodges J. Cormier, Jr.[9] Petitioners contend that the record of voir dire as to these

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[8] *Cruz* Supplemental Memorandum (adopted by Velez), Rec. Doc. 47, p. 8.

[9] Petitioners appear to concede that the record contains race-neutral explanations for the prosecutor's challenges against other black jurors.

jurors contains no evidence of a race-neutral explanation for the prosecutor's exercise of peremptory challenges against them. Velez contends:

> Here, the record does not fairly support a finding that prospective jurors Charles and Cormier were excluded for the race-neutral reason that these jurors might be adverse to the State's desire to impose the death penalty.
>
> Likewise, the record does not fairly support a finding that there was absolutely no inference of discrimination in the challenges made to those two African-American jurors. The striking of these two African-American jurors followed mere cursory questioning. That questioning did not elicit an answer that could rationally explain strikes on the basis of race-neutral reasons. This alone is all that is necessary to create an inference of discrimination.

(*Velez* Rec. Doc. 2, p. 4-5).

For the reasons stated above, I find ample evidence in the record that the prosecution did not exercise its peremptory challenges solely on the basis of race, and that no prima facie *Batson* violation was established by petitioners. Even if this court were to conclude that the appeals court erred and that petitioners established a prima facie *Batson* claim at trial, petitioners' *Batson* claim must fail considering the evidence presented at the hearing.

Once a prima facie *Batson* claim is established, the burden shifts to the prosecution to offer a facially race-neutral explanation for the peremptory challenge at issue.

This explanation need not be "persuasive, or even plausible." *Purkett*, 115 S.Ct. at 1771. The third step is a determination whether the prosecutor's explanation is facially race-neutral and whether the petitioners have proven purposeful racial discrimination. *Id.*

The testimony and other evidence presented at the evidentiary hearing eradicated petitioners' *Batson* claims. Prosecutor Premila Burns provided testimony in impressive detail with respect to all aspects of the voir dire which took place at petitioners' trial. Ms. Burns had made and still had in her possession contemporaneous notes with respect to the name and race of each juror questioned, who challenged the juror, the reasons for the challenge if exercised by the prosecution, and whether any contemporaneous objection was made as to the challenge. Ms. Burns' testimony also corroborated facts contained in the record and relied upon by the Third Circuit in its finding that petitioners failed to establish a prima facie *Batson* violation.

Copies of Ms. Burns' notations were introduced into evidence as State's Exhibits 1, 2, 3 and 4. The State also introduced the master juror list which contains additional information regarding the number of jurors in the entire venire and some information regarding their race. The evidence confirms that of the 36 peremptory challenges exercised by the State, 15 were exercised against black jurors and 21 were exercised against white jurors. Ms. Burns went down the list of each peremptory challenge, providing the specific reasons for the challenge.[10]

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[10] *See* the transcript of evidentiary hearing (TR pp. 40, *et.seq.*)

Most of the state's peremptory challenges against the 15 black jurors were exercised because of their weak position on capital punishment. The state was seeking the death penalty against all three defendants. However, other reasons Ms. Burns noted for exercising the peremptory challenges included issues regarding the intelligence of the juror, expressions of fear regarding the defendants, and in one case, the fact that the juror had recently been fired for sleeping on the job combined with a statement by the juror that he would automatically vote for the death penalty as to the trigger man.

With respect to the two jurors specifically mentioned by petitioners, Ms. Burns offered credible race-neutral explanations for her challenges. There were three reasons for the peremptory strike against Rosa Charles. The first was that she seemed unresponsive to the questions asked by the state. The second was that the prosecutor sensed that Ms. Charles would have a problem returning the death penalty as to the non-present principals to the crime. The third was that none of the defense attorneys asked questions of the juror, thus raising the prosecutor's suspicions that they had inside information about her.[11]

There were two race-neutral reasons offered for exercising the peremptory strike against Hodges Cormier. First, Ms. Burns testified that Cormier was obviously homosexual. Second, Cormier indicated to the judge that he had stitches in his foot which would require removal during the trial.[12]

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[11] TR pp. 52-53.

[12] TR pp. 58-59.

As discussed above, once the prosecution articulates a race-neutral explanation for removing a juror, the court must determine whether the opponent of the strike has proved purposeful discrimination. The Supreme Court has emphasized that at the third step, the ultimate burden of persuasion is upon the opponent of the strike. *Purkett, supra* 115 S.Ct. at 1771. Applying this standard to the facts presented, I conclude that no *Batson* violation occurred. The prosecutor not only offered race-neutral explanations for her peremptory challenges, she also produced contemporaneous notes from the 1987 trial establishing that the reasons offered at the evidentiary hearing were not fabricated or falsely recalled. The reasons offered at the hearing for the peremptory challenges are also corroborated by the transcript of the jury voir dire.

Finally, petitioners failed to introduce any evidence whatsoever that the proffered reasons were pretextual, or that the prosecutor's challenges were the product of purposeful discrimination.

Accordingly, I conclude that petitioners are not entitled to habeas corpus relief on the *Batson* claim.

* * *

[CLAIMS OF CODEFENDANT VELEZ DELETED]

* * *

4. DENIAL OF REQUESTED JURY INSTRUCTION

The last issue presented is raised by petitioner Cruz, who alleges that the trial court erred in refusing to call witnesses regarding the unreliability of eyewitness identification, and in refusing to give a jury instruction on

eyewitness identification. The trial court ruled that the charge proposed by Cruz "was adequately covered in the general charge . . . and possible prejudice would result in the court's pinpointing of a particular area of the evidence." (SR Vol. 48, p. 12602-12603).

The jury instruction given by the court was as follows:

> In evaluating the testimony of a witness, you may consider his or her ability and opportunity to observe and remember the matter about which he or she testified, his or her manner while testifying, any reason he or she may have for testifying in favor for or against the state or the defendant, and the extent to which the testimony is supported or contradicted by other evidence.

(SR Vol. 48, p. 12589).

As the Third Circuit noted, Cruz' proffered special jury charge was never submitted in writing, in violation of Louisiana Code of Criminal Procedure art. 807. *Velez, supra*, 588 So.2d at 136, fn. 5. However, since the Third Circuit reached the merits of this issue, it cannot be resolved on the basis of procedural default. Having reviewed the contention of the petitioner, and the analysis of the Third Circuit, I conclude that no error meriting habeas relief is presented.

Federal habeas relief for state prisoners is warranted only on grounds that the prisoner's confinement violates the Constitution, laws, or treaties of the United States. 28 U.S.C. § 2254(a) (1988). Habeas relief for constitutional trial errors must be granted only when the error "had

substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710, 1714, 123 L.Ed.2d 353 (1993).

Trial errors which are not of constitutional magnitude are generally not cognizable in federal habeas proceedings, regardless of whether they constitute breaches of federal or state law. *Pulley v. Harris*, 465 U.S. 37, 41-42 (1984). General improprieties occurring at trial are cognizable only if they result in fundamental unfairness and thus violate the petitioner's Fourteenth Amendment right to due process. *Herrera v. Collins*, 113 S.Ct. 853, 866 (1993).

When a jury charge is at issue, the jury charge as a whole must be examined to see if the jury was misled and whether the defendant was prejudiced. *United States v. Barlett*, 633 F.2d 1184 (5th Cir.), *cert. denied*, 454 U.S. 820, 102 S.Ct. 101, 70 L.Ed.2d 91 (1981); *Anderson v. Butler*, 23 F.3d 593, 598 (1st Cir.), *cert. denied*, 115 S.Ct. 331 (1994) (due process not violated by instructional error when error did not taint fundamental fairness of proceedings).

A review of the entire jury charge in this case reveals that the jury was not misled and that the petitioner suffered no prejudice from the trial court's refusal to give a special jury instruction on eyewitness testimony. Furthermore, the alleged error is not one of constitutional magnitude entitling Cruz to habeas relief.

CONCLUSION

For the foregoing reasons, I conclude that petitioners' grounds for habeas relief are without merit, and recommend that the petitions be DENIED.

Under the provisions of 28 U.S.C. § 636(b)(1)(C) and Rule 72(b), F.R.C.P., the parties have ten (10) days from service of this Report and Recommendation to file specific, written objections with the Clerk of Court. Counsel are directed to furnish a courtesy copy of any objections or responses to the district judge at the time of filing.

Failure to file written objections to the proposed factual findings and/or the proposed legal conclusions reflected in this Report and Recommendation within ten (10) days following the date of its service, or within the time frame authorized by Rule 6(b) F.R.C.P., shall bar an aggrieved party from attacking either the factual findings or the legal conclusions accepted by the District Court, except upon grounds of plain error. *See Douglass v. United Services Automobile Association*, 79 F.3d 1415 (5th Cir. 1996).

Lafayette, Louisiana, this 18th day of July, 1996.

/s/ Mildred E. Methvin
Mildred E. Methvin
United States Magistrate Judge
705 Jefferson St., Suite 207
Lafayette, La. 70501
(318) 262-6651
262-6653 (FAX)

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF LOUISIANA
Lake Charles Division

Civil Action No: 93-2027
Judge: JOHN M. SHAW

LOUIS [sic] CARLOS QUINTERO-CRUZ,

Petitioner,

vs.

KELLY WARD, Warden of David Wade Correctional Center; et al.

Respondents.
_____/

OBJECTIONS TO MAGISTRATE'S REPORT AND RECOMMENDATION

The Petitioner, LOUIS [sic] CARLOS QUINTERO-CRUZ, by and through undersigned Counsel files this Objections To Magistrate's Report And Recommendation and in support thereof states:

The magistrate judge has filed a report and recommendation [hereafter: "report"] that Petitioner Cruz' petition for a writ of habeas corpus be denied. To avoid redundancy, Petitioner Cruz objects to those factual findings and legal conclusions made by the magistrate judge, which are inconsistent with those factual and legal arguments previously asserted in Mr. Cruz' habeas corpus petition and incorporated memorandum of law and also previously asserted in his supplemental memorandum of law. Both of those pleadings are already filed in this case and are adopted here.

Certain matters contained in the report and recommendation warrant additional objection and supplementation of previously made factual and legal arguments.

In his petition, Petitioner Cruz did not raise an issue regarding the jury notes. In footnote 2 on page 3 of the magistrate judge's report, the judge stated that she granted an oral motion of Petitioner Cruz to adopt this issue, which had been raised by a co-defendant, Mr. Velez. The magistrate judge further stated that Cruz was allowed to file a formal motion after the evidentiary hearing. That finding is clearly factually incorrect. This is established by pages 150-152 of the transcript of proceedings held on July 12, 1995. One of Mr. Cruz' attorneys suggested that Mr. Cruz might adopt that issue, if there was no problem of exhaustion of available state remedies as to that issue. The judge expressly denied an oral motion to adopt the jury note issue. The judge told that attorney to file a formal motion after the hearing, if Cruz wanted to adopt this issue of Mr. Velez. Petitioner Cruz decided against adoption of this issue. No formal motion was ever filed with the Court. Consequently, Petitioner Cruz did not and is not adopting Velez' issue regarding the jury notes.

As a consequence, there is no issue that Petitioner Cruz did not exhaust both of the claims, which he is asserting in his petition for a writ of habeas corpus.

Petitioner Cruz is entitled to another evidentiary hearing on his *Batson* claim. During the evidentiary hearing, specifically page 19 of the transcript of July 15, 1995, the magistrate judge indicated that Petitioner Cruz had to prove his claim by clear and convincing evidence. As

established on page 10 of Mr. Cruz' supplemental memorandum of law, the proper standard of proof is proof by a preponderance of the evidence.

Nowhere in the magistrate judge's report, did that jurist indicate that she erred in the standard she announced at the evidentiary hearing and that she was using the correct legal standard of proof for the findings of fact contained in her report and recommendation. Consequently, it must be assumed that the magistrate judge disregarded Mr. Cruz' objection and utilized the same standard of proof announced by that judge at the evidentiary hearing. Because the wrong legal standard of proof was used by the magistrate, Petitioner Cruz is entitled to a new evidentiary hearing.

In Mr. Cruz' supplemental memorandum of law, Mr. Cruz argued that the initial determination by the Louisiana *appellate* court in this case as to whether a prima facie case was established was not a finding of fact entitled to a presumption of correctness. Peculiar to the procedural history of this case, the appellate court's ultimate finding on step one of the *Batson* inquiry is not entitled to a presumption of correctness. The magistrate judge expressly rejected Petitioner Cruz' position on this matter. (Report at page 11). The magistrate's legal ruling is erroneous for the reasons previously argued by Mr. Cruz in his supplemental memorandum of law.

On page 14 of the report, the magistrate judge concludes that the Louisiana appellate court was correct in concluding from the cold transcript that there was no pattern of strikes of black jurors. This legal ruling is erroneous.

The Supreme Court used the phrase "pattern of strikes" as a basis to establish a prima facie case of discrimination. It must be assumed that the Supreme Court did not write useless verbiage in its opinions. The analysis employed by the magistrate judge eliminates any means of establishing a pattern of strikes in the context of establishing a prima facie case. Viewed from a different perspective, how can a pattern of strikes be shown, using the magistrate judge's analysis. On this cold record, if a pattern of strikes has not been established, no pattern of strikes can ever be established by anyone in any case. Ten of the fifteen stricken black jurors were struck before the State accepted a black juror.

The magistrate judge rejected the Batson claim on an alternative theory. That judge held an evidentiary hearing on July 12, 1995. The magistrate judge found all of prosecutor Burns' testimony credible. Among other things, the magistrate judge found that black juror Cormier was lawfully challenged on the basis that this prospective juror was homosexual.

Under the magistrate judge's own findings, Petitioner Cruz is entitled to relief. The explanation given by the prosecutor must be facially valid. The requirement that the reason be legitimate does not mean that it be persuasive or even plausible, but that it does not deny equal protection. *United States v. Fike*, 82 F.3d 1315 at 1320 (5th Cir. 1996). The striking of Mr. Cormier, because he was homosexual, is a denial of equal protection. *Romer v.*

Evans, 116 S.Ct. 1620 (1996); *see J.E.B. v. Alabama ex rel. T.B.*, 114 S.Ct. 1419 (1994).

Respectfully submitted,

/s/ Arthur Joel Berger
ARTHUR JOEL BERGER

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LUIS CARLOS QUINTERO-CRUZ	**CIVIL ACTION NO. 93-2027**
VERSUS	**LAKE CHARLES DIVISION**
KELLY WARD, WARDEN, WADE CORRECTIONAL CENTER	**JUDGE SHAW**
	MAGISTRATE JUDGE METHVIN

****

MIGUEL VELEZ	**CIVIL ACTION NO. 94-0120**
VERSUS	**LAFAYETTE-OPELOUSAS DIVISION**
KELLY WARD, WARDEN, WADE CORRECTIONAL CENTER	**JUDGE SHAW**
	MAGISTRATE JUDGE METHVIN

JUDGMENT

(Filed Aug. 12, 1996)

This matter was referred to United States Magistrate Judge Mildred E. Methvin for her Report and Recommendation. After an independent review of the record, this Court concludes that the Report and Recommendation of the magistrate judge is correct and this Court adopts the conclusions set forth therein.

Accordingly, IT IS HEREBY ORDERED that petitioners' applications for writs of habeas corpus are DENIED and this matter is DISMISSED with prejudice.

Lafayette, Louisiana, this 12th day of August, 1996.

/s/ John Shaw
Judge, U.S. District Court

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

CIVIL ACTION CASE NUMBER: 93-2027
LAKE CHARLES DIVISION
JUDGE JOHN M. SHAW

LUIS CARLOS QUINTERO-CRUZ, Petitioner, vs. KELLY WARD, et al., Respondents.	**REQUEST FOR CERTIFICATE OF APPEALABILITY**

Petitioner, LUIS CARLOS QUINTERO-CRUZ, hereby requests this Court to issue a certificate of appealability pursuant to Federal Rule of Appellate Procedure 22, as amended April 24, 1996.

The legal standard to be used under this new rule is the same as that formerly utilized in habeas corpus litigation to evaluate an application for a certificate of probable cause. *Reyes v. Keane*, 90 F.3d 676 (2d Cir. 1996); *Lennox v. Evans*, 87 F.3d 431 (10th Cir. 1996). To obtain issuance of the certificate, the petitioner does not have to show that he would prevail on the merits. All that must be shown is that the issues presented by petitioner are debatable among jurists of reason; that a court could resolve that issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further. *Washington v. Johnson*, 90 F.3d 945 at 949 (5th Cir. 1996); *Harris v. Johnson*, 81 F.3d 535 at 538 (5th Cir. 1996).

All of the issues raised in Petitioner Cruz' petition, supplemental memorandum of law, and objections to the report and recommendation of the magistrate judge satisfy this legal standard. There is no frivolous issue. Indeed, here, the magistrate held an evidentiary hearing.

WHEREFORE the Petitioner, LUIS CARLOS QUINTERO-CRUZ, respectfully requests this Court to issue a certificate of appealability as to all issues presented in and derived from his petition.

Respectfully submitted,

/s/ Arthur Joel Berger
ARTHUR JOEL BERGER
Suite 506
9200 South Dadeland Blvd.
Miami, Florida 33156
Phone: (305) 670-0067

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

LUIS CARLOS QUINTERO-CRUZ	CIVIL DOCKET NUMBER 93-2027
VS.	JUDGE SHAW
KELLY WARD, WARDEN, ET AL	MAGISTRATE JUDGE METHVIN

CERTIFICATE OF APPEALABILITY

(Filed Jan. 2, 1997)

The defendant has requested a certificate of appealability from the district court's denial of his motion for relief under:

[X] 28 U.S.C. § 2254

[ ] 28 U.S.C. § 2255

The defendant is:

[X] A pauper

[ ] Not a pauper

After complete review of the record the court finds:

[ ] The district court is without authority to issue a certificate of appealability sought by the petitioner from a denial of his motion for relief under 28 U.S.C. § 2255.

[ ] A certificate of appealability shall issue upon this court's finding that the petitioner has demonstrated that the issues are debatable among jurists of reason; that a court

could resolve the issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further, for the reasons set forth below.

[X] A certificate of appealability shall not issue for the reasons stated below:

REASONS:

The petitioner's appeal is without merit. Petitioner has failed to establish a prima facie *Batson* violation and the record fails to support any finding of purposeful racial discrimination. The trial court's decision to refuse to give a special jury instruction on eyewitness testimony did not mislead the jury or result in fundamental unfairness of the proceedings.

THUS DONE AND SIGNED at Lafayette, Louisiana, this 31st day of December, 1996.

/s/ Illegible
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Case Number: 96-30952

LUIS CARLOS QUINTERO-CRUZ,

Appellant,

vs.

KELLY WARD, et al.,

Appellee.

_____/

REQUEST FOR CERTIFICATE OF APPEALABILITY

The Appellant, LUIS CARLOS QUINTERO-CRUZ, by and through undersigned counsel files this Request For Certificate Of Appealability and in support thereof states:

This case involves an appeal from an order denying a petition for a writ of habeas corpus, which was filed by a state prisoner pursuant to 28 United States Code Section 2254. An evidentiary hearing was held on one of claims made in Appellant's petition. The trial judge adopted the magistrate's recommendation that the petition be denied. Appellant filed a request for a certificate of appealability with the trial judge. In an order filed January 2, 1997, the trial judge denied a certificate to Appellant. A copy of that order has just been transmitted to this Court by the clerk of the lower court.

This present request for a certificate of appealability is being filed pursuant to Federal Rule of Appellate Procedure 22(b), which rule permits Appellant to seek a

certificate from this Court, when the trial court previously denied a prisoner's request.

Appellant was granted an evidentiary hearing before the magistrate judge on one of his federal constitutional claims. It is respectfully submitted that the trial court misperceived the liberal standard for the issuance of a request for a certificate of appealability.

The standard for the issuance of a certificate of appealability is the same standard as that used previously to determine the issuance of a certificate of probable cause. To obtain this certificate all that must be demonstrated is a substantial showing of the denial of a federal constitutional right. The Appellant must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues in a different manner or that the questions are adequate to deserve encouragement to proceed further. *Drinkard v. Johnson*, 97 F.3d 751 at 755-756 (5th Cir. 1996). This standard does not require the Appellant to show that he would prevail on the merits. *Harris v. Johnson*, 81 F.3d 535 at 538 (5th Cir. 1996).

Appellant raised two federal constitutional claims below. For present purposes, all that is necessary to meet the above standard is a brief discussion of one of these two claims, namely the denial of Appellant's claim that the state court violated the decision in *Batson v. Kentucky*, 476 U.S. 79 (1986).

The magistrate judge held an evidentiary hearing on the *Batson* claim. That judge issued a twenty-nine (29)

page written report and recommendation.[1] In his objections to this report, Appellant Quintero-Cruz asserted that the magistrate judge (1) used the wrong legal standard to evaluate the evidence elicited during the evidentiary hearing; (2) improperly determined that a finding of the state appellate court was entitled to a presumption of correctness; (3) erred in its determination that a pattern of strikes of black prospective black jurors had not been shown from the state court record on appeal; and (4) erred in accepting the prosecutor's explanation for the striking of one black juror, which the prosecutor presented for the first time at the federal evidentiary hearing, because that explanation was facially invalid.

The trial judge adopted the magistrate's report without any discussion about why that trial judge was rejecting all, or even any one, of the objections made by Appellant to the magistrate's report.

In his order denying a certificate of appealability, the trial judge stated that "[t]he petitioner's appeal is without merit" and succinctly stated why the magistrate judge ruled against Appellant.

The trial judge used the wrong standard to evaluate whether a request for a certificate of appealability should be granted. As stated above, the issue is not whether in the opinion of the trial judge the habeas corpus claims are without merit. Indeed, if the trial court found merit in any claim, this prisoner would not have to take an appeal.

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[1] Seven pages addressed two claims raised by a co-defendant.

In this case, the issues raised in Appellant's objections to the magistrate's report and recommendation are, themselves, sufficient to meet the correct legal standard and establish that this appeal is not frivolous.

WHEREFORE the Petitioner, LUIS CARLOS QUINTERO-CRUZ, respectfully requests this Court to issue a certificate of appealability and to permit this appeal to proceed.

Respectfully submitted,

/s/ Arthur Joel Berger
ARTHUR JOEL BERGER

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-30952
USDC No. 93-CV-2027

LUIS CARLOS QUINTERO-CRUZ,

Petitioner-Appellant,

versus

KELLY WARD, Warden,

Respondent-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana

(Filed May 27, 1997)

ORDER:

Luis Carlos Quintero-Cruz has applied for issuance of a certificate of appealability ("COA") authorizing an appeal from the district court's order denying his petition for a writ of habeas corpus. Quintero-Cruz contends that blacks were excluded from the jury in violation of the rule in *Batson v. Kentucky*, 476 U.S. 79 (1986). A COA may be issued only if the applicant makes a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2); *Drinkard v. Johnson*, 97 F.3d 751, 756 (5th Cir.

1996) (§ 2254 case), *cert. denied*, 117 S. Ct. 1114 (1997). Quintero-Cruz has not met this standard. Therefore, his request for a COA is DENIED.

/s/ Patrick E. Higgenbotham
PATRICK E. HIGGINBOTHAM
UNITED STATES CIRCUIT
JUDGE

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA 70130

May 27, 1997

Mr Robert H Shemwell, Clerk
Western District of Louisiana, Shreveport
United States District Court
300 Fannin Street
Suite 1167
Shreveport, LA 71101

No. 96-30952 Quintero-Cruz v. Ward
USDC No. 93-CV-2027

Enclosed is a certified copy of the judgment issued as the mandate.

Record/original papers/exhibits are returned:

(3) Volumes (1) Envelope ( ) Boxes

Sincerely,

CHARLES R. FULBRUGE III,
Clerk

By: /s/ Karen Whittington
Karen Whittington,
Deputy Clerk